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# EQUITY FETISHISM

AN ANALYSIS AND THEORY OF CIVIL JUSTICE IN MODERNITY

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PhD Thesis in Law

Birkbeck College, University of London 2018

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I declare that the following thesis is all my own work:

A handwritten signature in black ink, appearing to be 'R. Han' or similar, written in a cursive style.

# *Abstract*

This thesis argues that the law of Equity is a means to complete justice for stakeholders of capitalism with a desire for and need to believe in the certainty and perfectibility of the symbolic of capitalist reason and logic. By applying a Marxist Freudian reading I claim that stakeholder desire for and insistence on certainty and perfectibility within contexts of Anglo-American, Western, capitalist civil justice is both characteristic of subjugation to the reason and logic of capital, and symptomatic of the power of the unconscious and of fantasy on subjectivity within capitalism. Starting with an account of the Tudor jurist, statesman and Lord Chancellor Thomas More in the sixteenth-century, this thesis explores the *long durée* of Equity and civil justice, including analyses of the role a neurotic legal community has in defining conscience, discretion and flexibility within the principles, substance and procedures of civil justice upon which the stakeholder relies.

Equity, therefore, provides a means for stakeholder's to express their desire for what is missing, what they lack, in the symbolic, and the response to this desire is, I claim, the construction of an elaborate fantasy: Equity fetishism. As a theory of civil justice predicated on a conjunction of law, political economy and psychology, Equity fetishism explains Equity, as a body of jurisprudence, form of private law reasoning, and mode of adjudication, within domains of capitalist civil justice as being determined by fantasy and desire as it is defined by the normative discourses and processes of case-law, legislation and civil justice reform. As a structure in fantasy within civil justice Equity fetishism works in and through institutions such as private property and trusts in order to maintain stakeholder belief in the limitless possibilities of capital accumulation, which in turn maintains stakeholder disavowal of the realities of castration, subjective longing, loss, and limitation in the symbolic.

Finally, this thesis aims to demonstrate that Equity fetishism is a vital consideration for critical and mainstream legal scholarship, as both a complementary and countervailing legal theory and discourse that is able to contribute to practical and theoretical legal thinking and education. Specifically, I argue, Equity fetishism accounts for and explains the influence of the vagaries of subjective psychic life on the development of institutions, concepts and practices in Equity and civil justice and, in particular, how these parallel and occur in harmony and agreement with capitalism.

# Introduction

## 1. The Thesis

This thesis analyses characteristics of the law of Equity (hereafter ‘Equity’) within Western (Anglo-American) Common Law, capitalist and neoliberal capitalist civil justice systems by means of a Marxist Freudian reading of fetishism. Equity and civil justice are understood here as juridical institutions, concepts, and practices *within* neoliberal capitalism in the contemporary setting, and therefore products of *inter alia* the fusion of law and economics fermented in Western Common Law jurisdictions, as well as subject to more generalized notions of competition, free-market efficiency standards, and legal utilitarianism that neoliberalism promotes<sup>1</sup>. What Man Yip and James Lee refer to as the ‘commercial pragmatism of simplifying legal standards for commercial actors, as well as wider commercial concerns’ underlying contemporary judicial reasoning that places equitable principles in ‘jeopardy’, this thesis interprets as symptomatic of the effect on law and procedures of civil justice wrought by neoliberal capitalism<sup>2</sup>.

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<sup>1</sup> On the characteristics of neoliberal capitalism highlighted here and more generally with regard to its impact upon law and legal systems in Western Common Law jurisdictions, see: Jeanne Lorraine Schroeder. 2004. *The Triumph of Venus: The Erotics of the Market*. Berkeley: University of California Press, p.14 – ‘the legal utilitarian [...] views all human relations in terms of individual self-interest’; David Harvey. 2005. *A Brief History of Neoliberalism*. Oxford: Oxford University Press, p.181 – ‘To live under neoliberalism also means to accept or submit to that bundle of rights necessary for capital accumulation. We live, therefore in a society in which the inalienable rights of individuals to private property, and the profit rate trump any other conception of inalienable rights you can think of’; Jodie Dean. 2009. *Democracy and Other Neoliberal Fantasies: Communicative Capitalism and Left Politics*. Durham: Duke University Press, p.132 – ‘the emergence of a new legal regime that strengthens the power and reach of the state by securing and protecting corporate, financial, and market interests’; Jodie Dean. 2012. *The Communist Horizon*. London: Verso, pp.122-123 – ‘neoliberalism designates a particular strategy of class domination that uses the state to promote certain competitive dynamics for the benefit of the very rich. [P]ursued through policies of privatization, deregulation, and financialization, and buttressed by an ideology of private property, free markets, and free trade’; Wendy Brown. 2015. *Undoing the Demos: Neoliberalism’s Stealth Revolution*. New York: Zone Books, p.151-152 – ‘More than simply securing the rights of capital and structuring competition, neoliberal juridical reason recasts political rights, citizenship, and the field of democracy itself in an economic register’. William Davies. 2017. *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition*. London: Sage, pp.86-89.

<sup>2</sup> Man Yip and James Lee. 2017. The Commercialisation of Equity. *Legal Studies*, Vol. 37, No. 4, p.648.



As juridical institutions, concepts, and practices *within* capitalism in its broader historical setting, Equity and civil justice and have long helped to define what Max Weber called, ‘the rational structure of the *law*’<sup>3</sup>. Capitalism and capitalist interests, Weber claims, ‘undoubtedly smoothed the path for the legal profession [*Juristenstandes*], with its specialist training in rational law, to dominate the administration of justice and other forms of administration’<sup>4</sup>. Chancery practitioners for instance, have long contributed to the capitalist legal system and profession that Weber highlights, I argue, through their evolution of a jurisprudence (rules, principles and doctrines) tailored towards maintaining exclusive and exclusionary regimes of private property, corporate and commercial interests, and institutions such as trusts that are valued as core interventions within ‘modern rational’ capitalism for the management of wealth and assets<sup>5</sup>.

As pillars of capitalism, private property and the safeguarding of private property rights and interests as a means of, among others things, developing financial capital, have ultimately benefited and guaranteed the success of a limited number of capitalist

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<sup>3</sup> Max Weber. 2002. *The Protestant Ethic and the “Spirit” of Capitalism and Other Writings*. Edited and Translated by Peter Baehr. London: Penguin, p.365

<sup>4</sup> Weber, 2002, p.365

<sup>5</sup> Weber, 2002, p.365; Geoffrey M. Hodgson. 2015. *Conceptualizing Capitalism: Institutions, Evolution, Future*. Chicago: University of Chicago Press, p.116 – ‘capitalism is a system with contract at its center’.

stakeholders<sup>6</sup>. Equally private property has made capitalism the principal mode of bourgeois socioeconomic desire, aspiration and organization in Western Common Law jurisdictions, not least, as Marx and Engels claim, due to a 'juridical illusion' of reducing law to the private will that underscores the selfish nature of much civil justice litigation<sup>7</sup>. Within capitalism, argues Nikolas Rose, individuals 'are forced into a profound inwardness, and cling for comfort to a belief in their own uniqueness, in the process

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<sup>6</sup> Inequality, as a description of capitalism's limited benefit, is not a theme that will be explicitly or specifically discussed during this thesis. It is nevertheless a powerful undercurrent to the critique as a whole, as left-critique, and encompasses a number of the concepts and ideas that are directly relevant to the nature of Equity and civil justice under discussion here, including how civil justice reaches and enforces determinations of what is just and fair. Therefore, some indication of how inequality is understood here is necessary. Ardent advocates of capitalism still recognise its ability to produce inequality. In contradistinction to centrist and left socialist and communist critique, however, this right-wing libertarian view tends to understand and explain inequality as a necessary function of capitalism that still leads to a wider and general benefit: Joseph A. Schumpeter. 2010. *Capitalism, Socialism and Democracy*. London: Routledge, pp.377-379 – 'no social system can work which is based exclusively upon a network of free contracts between (legally) equal contracting parties and in which everyone is supposed to be guided by nothing except his own (short-run) utilitarian ends [...] Capitalism means a scheme of values, an attitude toward life, a civilization – the civilization of inequality'; as a victory for bourgeois capitalists over the inequality they suffered at the hands of feudal lords and the aristocracy: Ludwig Von Mises. 2009. *The Anti-Capitalist Mentality*. Mansfield Centre: Martino Publishing, pp.6-7 – 'the preservation of these feudal intuitions was incompatible with the system of capitalism. Their abolition and the establishment of the principle of equality under the law removed the barriers that prevented mankind from enjoying all those benefits which the system of private ownership of the means of production and private enterprise makes possible'; or a liberal requirement in order to resist the incursion of government on private interests: Milton Friedman. 2002. *Capitalism and Freedom*. Chicago: University of Chicago Press, p.176 – 'Much of the actual inequality derives from imperfections of the market. Many of these have themselves been created by government action or could be removed by government action. There is every reason to adjust the rules of the game so as to eliminate these sources of inequality'. More centrist and centre-left responses recognise the failure of capitalism, but not irredeemably so: Angus Deaton. 2013. *The Great Escape: Health, Wealth, and the Origins of Inequality*. Princeton: Princeton University Press, p.327 – 'Economic growth is the engine of the escape from poverty and material deprivation. Yet growth is faltering in the rich world. Growth in each recent decade has been lower than in the previous one. Almost everywhere, the faltering of growth has come with expansions of inequality'; Thomas Piketty. 2014. *Capital in the Twenty-First Century*. Translated by Arthur Goldhammer. Cambridge: The Belknap Press of Harvard University Press, p.20 – 'the resurgence of inequality after 1980 is due largely to the political shifts of the past several decades, especially in regard to taxation and finance. The history of inequality is shaped by the way economic, social, and political actors view what is just and what is not, as well as by the relative power of those actors and the collective choices that result; Joseph E. Stiglitz. 2013. *The Price of Inequality*. London: Penguin, p.4 – 'Countries around the world provide frightening examples of what happens to societies when they reach the level of inequality toward which we are moving. It is not a pretty picture: countries where rich live in gated communities, waited upon by hordes of low-income workers; unstable political systems where populists promise the masses a better life, only to disappoint. Perhaps most importantly, there is an absence of hope. In these countries, the poor know that their prospects of emerging from poverty, let alone making it to the top, are minuscule. This is *not* something we should be striving for'.

<sup>7</sup> Karl Marx and Frederick Engels. 1970. *The German Ideology*. Edited by C.J. Arthur. London: Lawrence & Wishart, p.81; J.A. Jolowicz. 1983. General Ideas and the Reform of Civil Procedure. *Legal Studies*, Vol. 3, Issue 3 (November), p.298

elaborating a complex inner world of self<sup>8</sup>. As a consequence Rose concludes, ‘the fundamental dialectic of modern society – maximum individualization and maximum ‘freedom’ is developed only at the price of maximum fragmentation, maximum uncertainty, maximum estrangement of individual from fellow individual’<sup>9</sup>. Certainty and coherence in the substance and procedure of civil justice becomes a necessary counterweight to the realities of existence within capitalism, therefore, and tempered by a flexibility and responsiveness that allows rules to bend to novel social and economic demands, this mode of existence is made enjoyable and desirable to stakeholders generally, and in their business and commercial activities, and Equity has over time *within* capitalism aimed to provide these things<sup>10</sup>.

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<sup>8</sup> Nikolas Rose. 1999. *Powers of Freedom: Reframing Political Thought*. Cambridge: Cambridge University Press, p.66

<sup>9</sup> Rose, 1999, p.66

<sup>10</sup> The flexibility that Equity brings to Common Law and civil justice substance and procedure, in particular, will be discussed at a number of points throughout this thesis, and is considered especially vital to understanding the role of Equity within neoliberal capitalism, which will be discussed in the final chapters. As an expression of the type of flexibility and responsiveness suggested, however, see, for example: Lord Cottenham L.C. in *Taylor v. Salmon* (1838) 4 My. & Cr. 134 at 14 – ‘I have before taken occasion to observe that I thought it the duty of this court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy’; Devlin LJJ in *Ingram v Little* [1961] 1 QB 31 at 73 – ‘The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice’; Millett J in *Lonrho plc. v Fayed and Others (No. 2)* [1992] 1 WLR 1 at 9 – ‘Equity must retain what has been called its “inherent flexibility” and capacity to adjust to new situations by reference to mainsprings of the equitable jurisdiction’; Lord Hoffmann in *Co-Operative Insurance Society Ltd. Respondents and Argyll Stores Ltd. Appellants* [1997] 2 WLR 898 at 901 – ‘A decree of specific performance is, of course, a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge’s discretion. *There are well-established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne L.C. once remarked, to “do more perfect and complete justice”* than would be the result of leaving the parties to their remedies at common law: *Wilson v. Northampton and Banbury Junction Railway Co.* (1874) L.R. 9 Ch App 279, 284’ [my emphasis]; P.J. Millett. 1998. Equity’s place in the law of commerce. *Law Quarterly Review*, Vol.114 (April), p.214 – ‘Equity’s place in the law of commerce, long resisted by commercial lawyers, can no longer be denied’; Lord Reed and Lord Neuberger in *Zurich Insurance plc UK v International Energy Group Ltd* [2015] UKSC 33 at 209 – ‘There is often much to be said for the courts developing the common law to achieve what appears to be a just result in a particular type of case, even though it involves departing from established common law principles. Indeed, it can be said with force that that precisely reflects the genius of the common law, namely its ability to develop and adapt with the benefit of experience’.

Chapter 4 will discuss the concept of private property in depth, for now, however, it can be summarily defined as contingent on notions of resource *scarcity* that give form to social relations (and market relations in a neoliberal capitalist schema) through bundles of legal, moral and customary rights, concepts and practices including *inter alia* those of use, possession, ownership, enjoyment and exclusion<sup>11</sup>. In the private property context these mechanisms can assume a particular quality as *safeguarding* functions that guarantee assignment of separate objects (things) to individuals, with libertarian and utilitarian approaches to private property foregrounding liberal policy and forging a morality based on private property and ownership, including through the greater contractual determination of property rights (a *contractarian* perspective)<sup>12</sup>. In contrast to what Suman Gupta calls Hayek's and Nozick's 'anti-political' conceptualization of private property within the libertarian tradition, here I argue that social and power relations *constitute* private property and property rights and that they are therefore *political* concepts and not, as Graham Virgo suggests, 'neutral'<sup>13</sup>. Contract meanwhile maintains a close association with private property and indeed 'presupposes the institution of property', and is of special concern within capitalism for enabling the

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<sup>11</sup> See for example: Marx and Engels, 1970, pp.79-81; J.W. Harris. 1996. *Property & Justice*. Oxford: Oxford University Press, p.1 – 'Property is a legal and social institution governing the use of most things and the allocation of some items of social wealth. 'Social wealth' comprises all those things and services for which there is a greater potential total demand than there is supply'; J.E. Penner. 1997. *The Idea of Property in Law*. Oxford: Oxford University Press; A.M. Honoré. 2013. Ownership. *Readings in the Philosophy of Law*. Edited by Jules L. Coleman. New York: Routledge, pp.563-574; Schroeder, 2004, pp.179-182; Gregory S. Alexander and Eduardo M. Peñalver. 2012. *An Introduction to Property Theory*. Cambridge: Cambridge University Press; Christopher Pierson. 2016. *Just Property, Volume Two: Enlightenment, Revolution, and History*. Oxford: Oxford University Press

<sup>12</sup> Obvious examples, some of which will be revisited at different points throughout this thesis, include: Robert Nozick. 1974. *Anarchy, State and Utopia*. New York: Basic Books; Ludwig Von Mises. 2005. *Liberalism: The Classical Tradition*. Edited by Bettina Bien Greaves. Indianapolis: Liberty Fund; F.A. Hayek. 2013. *Law, Legislation and Liberty*. London: Routledge Classics;

<sup>13</sup> Suman Gupta. 2001. *Corporate Capitalism and Political Philosophy: Corporate Capitalism and Political Philosophy*. London: Pluto Press; Graham Virgo. 2015. *The Principles of the Law of Restitution*. 3<sup>rd</sup> Edition. Oxford: Oxford University Press, p.15

'wealth-allocating function' of property by *inter alia* dissociating it from property's use-control function<sup>14</sup>.

For the purposes of this thesis, it is important to note that no specific or definitive dates can be put on the origin of capitalism, which remains a complex question much debated by economic historians<sup>15</sup>. The emergence of capitalism is however understood here to involve a series of sociocultural, legal (including determinations of an evolution in the jurisprudence of property and contract), and political shifts in Britain, France and other European nations that started in the fifteenth century, gathered pace during the sixteenth century, and matured during the Enlightenment and post-Enlightenment with the onset of Revolution in England, America, and France and the rise of industrialization and urbanization<sup>16</sup>. The evolution, systemisation and ultimate calibration of Equity and civil justice to capitalism and forms of commercialism symptomatic of capitalist reason and logic will be explored at key stages in history including the nineteenth-century and late twentieth-century, notably the same periods that Thomas Piketty identifies with the 'prodigiously inegalitarian' "'first globalization" of finance and trade (1870-1914)', and 'the "second globalization", which has been under way since the 1970s'<sup>17</sup>. As well as via figures of note who have been influential in shaping legal thinking, reform, and the relationship and tensions between law and economics, including Jeremy Bentham, Frederick Hayek and Richard Posner.

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<sup>14</sup> Harris, 1996, p.50

<sup>15</sup> Robert Heilbroner. 2000. *The Worldly Philosophers*. London: Penguin; Weber, 2002; Hodgson; 2015; Ellen Meiksins Wood. 2017. *The Origins of Capitalism: A Longer View*. London: Verso

<sup>16</sup> Eric Hobsbawm. 1992. *The Age of Revolution 1789-1848*. London: Abacus, pp.13-16; Victor D. Lippit. 2005. *Capitalism*. London: Routledge, p.1; Bruce R. Scott. 2011. *Capitalism: Its Origins and Evolution as a System of Governance*. Berlin: Springer; Hodgson. 2015, p.17; Pierson, 2016

<sup>17</sup> Piketty, 2014, p.28

*Equity fetishism* is symptomatic of the influence on the subject, as well as on the systems and institutions that organize the society in which the subject exists, of ideology, fantasy and desire constituted around the logic and economic reason of the type of neoliberal capitalism described above. The overlap between theories of ideology and fetishism are viewed here as productive of critical insight into the truth of the stakeholder, who, it may be said, exists within what Lorenzo Chiesa and Alberto Toscano have called the 'ideological force-field of contemporary capitalism'<sup>18</sup>. But who also, through that same combination of ideology and fetishism, enjoy and find pleasure in their existence by virtue of the fantasies that ideology and fetishism together construct and promulgate on their behalf. 'Fantasies can make life bearable, though they can also lead us to error', argues Bernard Harcourt, but they are sometimes 'so extravagant or unrestrained that the person fantasizing should know, herself, that they are unreal. In that sense, the person may be complicit in the act of fantasizing'<sup>19</sup>. What Karl Polanyi called 'atomistic and individualistic' organic forms and Louis Althusser referred to as 'interpellated subjects', I interpret here as *stakeholders*<sup>20</sup>. Stakeholders are economic subjects complicit in the fantasy Harcourt describes; who willingly answer the call of capitalism to engage in, amongst other things, free-market logics of competition and efficiency, whilst all the time seeking to accumulate, exploit and seize opportunities to exercise their self-interest, economic advantage and gain, even where that might or does involve calling foul, unfair or unequal the bargaining and conduct of other stakeholders.

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<sup>18</sup> Lorenzo Chiesa and Alberto Toscano. 2007. Agape and the Anonymous Religion of Atheism. *Angelaki Journal of Theoretical Humanities*, Vol. 12, No.1 (April), p.118

<sup>19</sup> Bernard E. Harcourt. 2012. Fantasies and Illusions: On Liberty, Order, and Free Markets. *Cardoza Law Review*, Vol. 33, Issue 6 (August), p.2418

<sup>20</sup> Karl Polanyi. 2001. *Great Transformation: The Political and Economic Origins of Our Time*. Boston: Beacon Press, p.171; Louis Althusser. 2008. *On Ideology*. London: Verso

As a theory of civil justice Equity fetishism first highlights the encounter of economic subjects within neoliberal capitalism with the ‘fact of castration as the requirement for entrance into society’, and then the nature of the stakeholder construction in fantasy of a fetish to conceal the threat of castration, which takes the form of demands, needs and desires directed at the institutions, concepts, and practices of Equity and civil justice<sup>21</sup>. Equity fetishism points to the fact of the unconscious as a vitiating factor within Equity jurisprudence and its place in civil justice procedure predicated on the stakeholder’s encounter with the trauma of castration, the paradigm negativity endured by all subjects that Maria Aristodemou calls the ‘trope of insufficiency, of loss, of absence [...] ‘lack’, which ‘instigates and permeates not only our cultural products, but our social, legal, and political practices’<sup>22</sup>. Further, Jeanne Schroeder, in her thesis on the erotics of markets, discusses the gendered aspects of castration that resonate with the present thesis, although gender is not a theme that will be explicitly covered here. ‘The two sexes are two positions one can take with respect to castration’, claims Schroeder, ‘denial and acceptance. The masculine, which feels that he has lost a precious part of himself, falsely claims to possess and exchange the object of desire. The feminine, which feels that she has lost her selfhood, accepts the role of identification with the enjoyment of the object of desire’<sup>23</sup>. Although, as stated a moment ago, gender is not an explicit theme in this thesis, on Schroeder’s account it is clear that the masculine form of castration is of primary concern here. Not because it necessarily tells us anything about capitalism than the account of feminine castration cannot, but because the masculine is reflective of the

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<sup>21</sup> Todd McGowan. 2013. *Enjoying What We Don’t Have: The Political Project of Psychoanalysis*. Lincoln: University of Nebraska Press, p.4

<sup>22</sup> Maria Aristodemou. 2014. *Law, Psychoanalysis, Society: Taking the unconscious seriously*. Abingdon: Routledge, p.7

<sup>23</sup> Schroeder, 2004, p.241. Following Jacques Lacan, Schroeder further develops her analysis by exploring the ways in which the feminine does not so much reside as a separate form of castration from the masculine, as one that the masculine represses and thus ultimately denies.

privileging of wealth maximisation within capitalism, as well as the dominance of patriarchy in shaping the conjunction between law and economics, including the civil justice system that the stakeholder utilizes to maintain their self-interest<sup>24</sup>.

Following Schroeder's account of masculine castration as the dominant mode in societies underscored by wealth maximisation, namely those within capitalism, she describes how the 'masculine must lie to himself and pretend nothing has been lost. *He must deny the existence of the real and act as though the symbolic were complete*' [emphasis added]<sup>25</sup>. This last statement is crucial to understanding the nature of the encounter that the stakeholder within capitalism has with castration, as a central theme of this thesis. An encounter that signals an insufficiency, loss or absence that the *fetishistic* stakeholder, importantly, refuses to acknowledge, and thus one they disavow and conceal via substitutes in fantasy, in this instance, Equity as a means to complete justice (hereafter 'ECJ').

## 2. Thesis Structure & Why Equity?

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The following thesis is a product of the academic imaginary within legal education. The format and structure of the thesis mirrors, in many respects, the format of mass market legal education textbooks and the Equity and Trusts courses in which they are used, insofar as it treats Equity as historically significant to the broader function of Common Law jurisdictions, and thus traces the idea of Equity from various points of historical meaning. As a critical account of Equity and the legal system more generally, however, this thesis does not reproduce legal histories and epistemologies without accounting for

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<sup>24</sup> Schroeder, 2004, p.243. The significance of Schroeder's account is even greater here because she applies in the form of a critique of Richard Posner's theory of law and economics, something this thesis will explore in more depth in Chapter 3.

<sup>25</sup> Schroeder, 2004, p.241



the social, political and economic contexts in which they are situated. A vast number of textbooks begin with the idea of Equity in Ancient Greece and with Aristotle<sup>26</sup>. For many, and for this thesis, Equity is traced to the present day from the medieval law, as a residuum of the conjunction of sacred injunctions of Canon and Ecclesiastical Law and the profane rules and doctrines of Common Law. A site summed up in the notion of Equity as a 'court of conscience', which has long since been supplanted or 'repressed', as Peter Goodrich argues, by the systematization of the Common Law jurisdiction<sup>27</sup>. In that sense, Equity fetishism as a relatively contemporary phenomenon (this thesis considers it as emerging from the socioeconomic and political shifts that occurred during the eighteenth and nineteenth centuries within capitalism) is symptomatic of and defence to, at least in part, what Freud referred to as the return of the repressed: 'The emotion that had disappeared re-emerges, transformed into social anxiety, tormented conscience, and unrelenting self-reproach, while the rejected idea undergoes a *substitution by displacement*, often on to something trivial or indifferent'<sup>28</sup>. As a bulwark of private property interests in Western capitalist societies, the suggestion here is not that Equity is trivial. As to its indifference, however, the following pages will aim to discover.

Following a chronological framework, the thesis begins by reviewing Equity during two notable periods in its development as a central pillar of civil justice in England. Firstly, during the early modern pre-capitalist Tudor period in which Equity, and in particular

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<sup>26</sup> See for example: E.H. Burn and G.J. Virgo. 2008. *Maudsley & Burn's Trusts & Trustees, Cases & Materials*. 7<sup>th</sup> Edition. Oxford: Oxford University Press; Michael Haley and Lara McMurty. 2011. *Equity & Trusts*. 3<sup>rd</sup> Edition. London: Sweet & Maxwell; Graham Virgo. 2012. *The Principles of Equity & Trusts*. Oxford: Oxford University Press; Jill E. Martin. 2012. *Modern Equity*. 19<sup>th</sup> Edition. London: Sweet & Maxwell; Scott Atkins. 2013. *Equity and Trusts*. London: Routledge; Gary Watt. 2014. *Trusts & Equity*. 6<sup>th</sup> Edition. Oxford: Oxford University Press; Alastair Hudson. 2017. *Equity and Trusts*. 9<sup>th</sup> Edition. London: Routledge

<sup>27</sup> Peter Goodrich. 1996. *Law in the Courts of Love: Literature and Other Minor Jurisprudences*. London: Routledge, pp.10-11; see also: Mark Fortier. 2005. *The Culture of Equity in Early Modern England*. Farnham: Ashgate; Dennis R. Klinck. 2010. *Conscience, Equity and the Court of Chancery in Early Modern England*. Farnham: Ashgate

<sup>28</sup> Sigmund Freud. 2005. *The Unconscious*. Translated by Graham Frankland. London: Penguin Modern Classics, p.44

the notion of conscience as the *sine qua non* of the Equity jurisdiction, began to shift from the ecclesiastical to civil domain under the tutelage of jurists including Christopher St. German, John Rastell and Edmund Plowden<sup>29</sup>. And perhaps most importantly, as Chapter 1 will discuss, under the influence of the Chancellorship of Thomas More and his particular conceptualization of conscience and divine moral authority that stands in stark contrast to the sort of Nietzschean theological return, if not a Freudian return, of the repressed that Equity fetishism within capitalism describes. Secondly, the eighteenth and nineteenth centuries, which saw wholesale reforms across law, politics, economics and social life in England and Wales, but equally in the younger settlor nations of America, Australia and Canada.

With regards to Equity the reform agenda came to a head with the enactment of the *Judicature Acts* 1873-75, which fused Equity and Common Law procedure in a new High Court system of civil justice with the notion of complete justice at its heart<sup>30</sup>. The notion of complete justice during this period will be explored beginning with the influence of Jeremy Bentham both on law reform generally, and on the complexion of civil justice both during the drafting of and after the *Judicature Acts* more specifically. The conjunction of Common Law and Equity is, I argue, a product of beliefs and desires, specifically displacement in the form of fantastical belief that ECJ offers capitalism as an answer to a lack that, for the stakeholder, always already resides elsewhere in the field of their

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<sup>29</sup> For a useful discussion on the development of Equity during the Tudor period, see: Fortier, 2005, pp.59-86

<sup>30</sup> The *Judicature* process did not cease with these Acts but continued to be (re)substantiated through various pieces of legislation (1975, 1925 and 1981), as well as the Rules of the Supreme Court ('RSC') (1883 and 1965) and Civil Procedure Rules ('CPR') in 1999. Other than the state of New South Wales, Australia followed the same course in the nineteenth-century, and as Chapter 3 will show, American civil justice across various states not only reimagined and reconfigured the roles of Common Law and Equity courts and procedures, but in the case of New York State actually influenced the English reform process.

existence<sup>31</sup>. The concept of Equity fetishism is symptomatic of the effects of the unconscious in the (re)production and mobilization of Equity's principles, rules and doctrines, and, perhaps more importantly, in the development of complete justice as a phenomenon of political economy since the rise of industrial and commercial capitalism.

The consequence of these reforms, as Chapter 2 will show, was to, in part, establish a new form of stakeholder belief in civil justice adjudication, particularly with regard to the nature of justice and the efficiency of its administration. As D.M. Kerly remarked shortly after Judicature, the reunion of the jurisdictions of Equity and Common Law was, so it was believed, going to make the administration of civil justice both 'cheaper and more certain'<sup>32</sup>. Belief, in other words, is as the theory of the fetish discussed later will show, and in particular the role of the fetish in concealing a lack of perfectibility or certainty in the subject as well as the institutions, systems and so on that subject relies upon, key to understanding the nature of the contemporary civil justice system. Amongst other things, this includes the ultimate belief in what John Sorabji calls the 'triumph of equity over the common law' following the Judicature reforms and the subsequent implementation of ECJ by the justice system as a whole<sup>33</sup>. And thus also the (re)emergence, the return, of Equity as a 'radically new commitment' to justice rooted in discretion and merit rather than via

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<sup>31</sup> It is important to note at this point that capitalism is not viewed here as static. Indeed, Equity fetishism can be mapped across at least four stages of capitalist evolution of the course of the last two hundred years: the classical economics of, for example, Adam Smith, David Ricardo and Marx during the first half of the nineteenth century; the neo-classical economics of, for example, Alfred Marshall, William Stanley Jevons, and Leon Walras in the latter half of the nineteenth century (arguably the direct ancestor of neoliberalism), which encompassed the Judicature age; the centre-left welfarism during the middle part of the twentieth century under the direction of John Maynard Keynes; and finally the neoliberal upsurge of the latter part of the twentieth century under the aegis of Frederick Hayek, Ludwig Von Mises and Milton Friedman. Capitalism is not static, and yet it would be wrong to say, even if somewhat reductionist, that these different manifestations of capitalism over the course of two hundred years do not engender the same fundamental ideological principles, not least the necessary predominance to all social life of economic reason.

<sup>32</sup> D.M. Kerly. 1889. *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery: Being the Yorke Prize Essay of the University of Cambridge for 1889*. Leopold Classic Library, p.294

<sup>33</sup> John Sorabji. 2014. *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis*. Cambridge: Cambridge University Press, p.56

stringent formalism<sup>34</sup>. And what Raymond Evershed called ‘the necessary elasticity’ of Equity that would ‘add by way of complement or appendix to the enacted law what may be required to *perfect the system as a whole*’ [emphasis added]<sup>35</sup>.

Following an historical review of Equity, Chapters 2, 3 and 4 will consider Equity within the field of political economy, and in particular, the relationship between Equity, private property and stakeholder’s of capitalism that will pave the way for the analysis of the theory of Equity fetishism. Chapters 5, 6 and 7 will substantiate the theory of Equity fetishism, most notably with regards to the work of both Marx and Freud. Finally, Chapters 8 and 9 will apply the theory of Equity fetishism to examples of post-Judicature and contemporary civil justice, with a particular focus on the impact of neoliberalism on long-standing juridical institutions and practices.

So, why Equity? Equity is, I suggest, generally under-utilised and perhaps under-valued, certainly in contemporary critical legal scholarship, as a site in which to interrogate the intersectionality of law, economics and the political<sup>36</sup>. Part of the aim of this thesis is to demonstrate the significance of Equity within critical scholarship. This involves placing Equity at the centre of debates concerning the ideological influence of capital on the private property order and scrutinizing Equity’s relationship to that ideology based on the place and role its jurisprudence has in maintaining a regime of private property rights and commercialism, as well as institutions and methods for growing financial capital and preserving personal and corporate wealth, notably through tax avoidance schemes underpinned by trusts law. By highlighting and bringing into question the relationship

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<sup>34</sup> Sorabji, 2014, p.47

<sup>35</sup> Raymond Evershed. 1954. Reflections on the Fusion of Law and Equity after 75 Years. *The Law Quarterly Review*, Vol. 70 (July), p. 341

<sup>36</sup> There is no precise measure for this claim and in that sense it is somewhat anecdotal. Yet research within the field of critical legal scholarship reveals, in my experience, a notable lack of work on Equity. See for example: <http://criticallegalthinking.com/> (accessed 26 June 2017)

between Equity, stakeholders and capitalism this thesis asks what is at stake politically from the operation of civil justice to meet these various ends, and thus contributes modestly to critical evaluations of law within capitalism.

The nature of Equity in capitalist modernity is considered here to be contingent upon a combination of materially historical, socioeconomic, political and psychological factors<sup>37</sup>. This makes the nexus between Equity jurisprudence, notions of complete civil justice and the private property order a site *par excellence* for analysing complex factors relating to capitalist and neoliberal capitalist subjectivities. Key overlaps between the work of both Marx and Freud on fetishism is instructive in this regard. For example, this thesis does not fully accept Marx's claim that, 'it is not the consciousness of men that determines their existence, but on the contrary, it is their social existence which determines their consciousness'<sup>38</sup>. Rather, as Freud's insistence on castration as a requirement for entrance into society attests, there is a claim to be made for certain psychic conditions in the production of the subject that necessarily prefigure the existence of the very 'men' that Marx refers to<sup>39</sup>. The conjunction of these two theories provide, I argue, a more thorough analysis of the subjects in question, and help bring into focus the role played by law and, in particular, Equity in relationship to them.

The discussion during this thesis will follow a path worn thin in places by discussants, enthusiasts and critics of the relationship between law and capitalism. Whether in light

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<sup>37</sup> The expression of modernity that can be traced throughout this thesis is indelibly marked by capitalism as form of 'systematic production' broadly defined, although capitalism itself will be examined in depth here. Modernity is construed, moreover, as a 'Western' phenomenon, insofar as, to echo Anthony Giddens, references to the development or evolution of civil justice is a reference 'to institutional transformations that have their origins in the West' (Anthony Giddens. 1991. *The Consequences of Modernity*. Cambridge: Polity Press, p.174)

<sup>38</sup> Karl Marx. 1859. *A Contribution to the Critique of Political Economy*. [Online] Available at: <https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm> (accessed 26 June 2017)

<sup>39</sup> McGowan, 2013, p.4

of the classic liberal capitalist fervour for individualism, entrepreneurialism and free trade in Victorian Britain, something that has re-emerged under contemporary forms of neoliberalism in the late twentieth century, or imperialist capitalism and heavy industry predicated on cartels, trusts and monopolies that have sought to conquer the world and often achieved this aim, Equity has been part of the 'rational' legal apparatus of civil justice that maintains the social order in light of economic reason. Underscoring the main ideas presented by this thesis is a critique of the influence of capitalist economic reason on the management and organization of public (State) institutions such as civil justice. This influence continually manifests itself through, for example, legitimization of reforms of civil justice that are justified predominately in terms of cost and efficiency. In recent decades this has led to questions relating to access to justice, legal aid, and the everyday ability of the courts to handle workloads, to name but three<sup>40</sup>. Yet issues such as these, and many others, remain unresolved and this thesis does not claim to have solutions or answers to them. What this thesis does maintain, however, is that capitalism is a root cause, and, therefore, the role of capitalism must be called into question and where necessary challenged.

Finally, it is important to describe some of the key elements of this thesis from the point of view of it being an academic and educational enterprise. As a theory of civil justice Equity fetishism contrasts with conventional analyses and wisdom of Equity, but necessarily so if a critical vocabulary of ECJ is to emerge. *Conventional wisdom* is, I claim, found in an array of discourse that include legal narratives, speeches, lectures, academic articles, case reports, commentary, and even to some extent work that self-identifies as

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<sup>40</sup> See, for example: Lord Woolf. 1996. Overview. *Access to Justice: Final Report*. [Online] Available at: <http://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm> (accessed 21 June 2018)

criticism of positive law and the *status quo*. To be clear, the *status quo* within which I argue the theory of Equity fetishism emerged and exists is not fixed throughout the period of time covered by the thesis. For the most part, it is defined here, as already claimed, by the pervasive influence of economic ideas, rituals and practices that constitute capitalist subjectivity, and its recent 'mutant' neoliberal form<sup>41</sup>. Whilst the conventional wisdom is in some circumstances useful as 'objective' insight into particular events or states of affair that constitute the *status quo* – the Hansard Parliamentary reports referred to in later chapters is an example. More importantly it reflects and reproduces privilege and command of a particular class over the sorts of discourse highlighted above, and that is why it is important for critique and analysis such as the one conducted here. 'Conventional' is a normative qualification, therefore, and it stems from the status of legal wisdom and conduct being in large part self-referential, self-perpetuating and resolvable on its own internal logic<sup>42</sup>.

Further, in their contrasting definitions of *general* and *restrictive jurisprudence*, where the latter resonates with the notion of conventional wisdom as it is applied here, Costas Douzinas and Adam Gearey define restrictive as an 'endless interrogation of the essence or substance of law' resulting in 'a limited number of institutions, practices and actors' being included and 'considered relevant to jurisprudential inquiry' and therefore a 'large number of questions' going unanswered<sup>43</sup>. Similarly, Wendy Brown and Janet Halley establish their critique of law and legal institutions and systems as stemming from the

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<sup>41</sup> Byung-Chul Han. 2017. *Psycho-Politics: Neoliberalism and New Technologies of Power*. Translated by Erik Butler. London: Verso, p.5

<sup>42</sup> Roger Cotterrell points to the role of legal critique to deal quite precisely with claims that law is a 'self-justifying edifice' rather than a 'social construct', which, among other things, also denies and seeks to denude the political status of law in contemporary capitalism (Roger Cotterrell. 1987. Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship. *Journal of Law and Society*. Volume 14. No. 1 (spring), p.79).

<sup>43</sup> Costas Douzinas and Adam Gearey. 2005. *Critical Jurisprudence: The Political Philosophy of Justice*. Oxford: Hart, p.10

problematic of law figuring as ‘technically neutral within liberalism’<sup>44</sup>. This requires a ‘left critique’ of the conventional wisdom of liberal and conservative jurisprudence and legal institutions that begins ‘with a critique of liberalism itself as well as an explicit focus on the *social powers* producing and stratifying subjects that liberalism largely ignores’, including, most notably, capital’s domination of the social and political<sup>45</sup>.

Discussion in later chapters examines *inter alia* conventional wisdom from the nineteenth-century and more recently in order to ascertain what is both said and left unsaid in that discourse about the socioeconomic and political landscape in which Judicature reform was fermented and from which, I argue, Equity fetishism emerged. Equity fetishism speaks to the notion of a distinct jurisdiction of conscience that has been both absorbed into the Common Law and therefore repressed and lost to some degree, but also preserved and valorised, not least, Peter Goodrich argues, by contemporary critical legal studies when it invokes ‘the ethical dimensions of judgment and justice’<sup>46</sup>. This point is important for two main reasons. Firstly, because of what it says about the nature of my own fetishism of Equity, a matter that will be covered in more detail shortly. Secondly, naming Equity fetishism makes possible the more precise orientation of general legal critique of the type described by the likes of Douzinas, Gearey, Brown and Halley, to Equity. It exposes Equity not only to students within law schools *qua* schools of divinity ‘devoted to the preservations of the faith’, but to a critical legal education that journeys ‘beyond the university walls into society at large’<sup>47</sup>. Naming Equity fetishism treats Equity as a *major* jurisprudence within the Common Law tradition. The

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<sup>44</sup> Wendy Brown and Janet Halley, 2002, Introduction. *Left Legalism/Left Critique*. Durham: Duke University Press, p.6

<sup>45</sup> Brown and Halley, 2002, p.6

<sup>46</sup> Goodrich, 1996, p.4

<sup>47</sup> Gary Watt. 2012. *Equity Stirring: The Story of Justice Beyond Law*. Oxford: Hart Publishing, p.42



heterogeneity of Equity anticipates and is thus primed for inter- and trans-disciplinary analysis. Equity invites consideration of where the social, legal, economic, psychological and political intermingle. It is because critical legal scholarship posits a 'great paradox of justice [...] clouded in controversy, uncertainty and disputation' that I argue Equity or more particularly the notion of ECJ demands interrogation<sup>48</sup>.

Equity fetishism is indicative of a particular form of collusion between civil justice and capitalism. Equity is not exclusive either in its dominion over private property, contract, nor in affording stakeholder's restitution or remedies if and when the social relations both property and contract involve fail to function as they ought to within the boundaries of the law and the expectations wrought by capitalist reason and logic. Common Law shares responsibility in supporting capitalism in its full array of practices. But through the theory of Equity fetishism, this thesis demonstrates the *peculiarities* of Equity's contribution, the specific fantasies to which Equity gives structure. Further, civil justice is not just a site for settling stakeholder property disputes, for calls to financial accountability, or paths to remedy and restitution within the logic of neoliberal capitalism. It is a way to (re)produce capitalist class power and ideology in order to guarantee neoliberal capitalism as a primary, prevailing social aim and standard for contemporary societies.

By structuring society this way capitalism both relies upon and generates psychological effects displaced onto the institutions, systems, networks, and so on that constitute and maintain the structure. '[L]aw and legal reasoning not only give form to the economic, but economize new spheres and practices', argues Wendy Brown, and in this way 'law becomes a medium for disseminating neoliberal rationality beyond the economy,

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<sup>48</sup> Douzinas and Gearey, 2005, p.28

including to constitutive elements of democratic life'<sup>49</sup>. What Brown is highlighting here, I claims, is the complexity of the conjunction between neoliberal capitalism and law (and Equity), the political, the economic, and psychological; a vast reality of fictions, illusions, fantasies, rituals and symbolism of which Equity is a small part and influence, but one, I argue, which demands greater critical attention.

### 3. Am I an Equity fetishist?

Fetishism is central to this thesis because of what it reveals about Equity and ECJ as socioeconomic, institutional, systemic and encoded symbolic forms. I agree with Lord Denning and Gary Watt insofar as both claim the 'essential educational nature of Equity'<sup>50</sup>. As a body of jurisprudence in the practice of the Chancery barrister and throughout civil justice, Equity holds a notable place and *application* in law. The primary concern for this thesis is to analyse and interrogate Equity as a text, to explore the language used to describe and apply it, to examine how it is spoken about, narrated, reported, valorised, and criticized. The aim is, in other words, to treat Equity as an object of educational intrigue and academic curiosity. This does, however, raise a potential problem that needs to be addressed before moving on: what is the extent to which this thesis can be accused of its own fetishism of Equity?

To talk of Equity or ECJ rather than simply law or civil justice problematizes Althusser's claim that such a distinction is merely 'internal to bourgeois law, and valid in the (subordinate) domains in which bourgeois law exercises its 'authority''<sup>51</sup>. This thesis

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<sup>49</sup> Brown, 2015, p.151

<sup>50</sup> Watt, 2012, p.42. Watt is himself referencing Lord Denning's claim that the new spirit of Equity is to be found in universities, by which one can assume is meant law schools. Although as this thesis argues there is a plurality to Equity that makes it multidisciplinary and thus does not confine it, necessarily or entirely to the law school. See: Alfred Denning. 1952. The Need for a New Equity. *Current Legal Problems*, Vol. 5, Issue. 1 (January), pp.1-10

<sup>51</sup> Althusser, 2008, p.18

agrees with Althusser's observations as to the fundamental nature of the distinction in terms of political economy but does not view it as credible from the point of view of critical method. This is because to overlook Equity or dissolve it into any one of the levels to which it is ultimately subservient (Common Law, civil justice or even the broader superstructure of capitalism) risks overgeneralization. To particularize in that sense is not to accept the authority of bourgeois law but to aim for a more precise criticism of it. By virtue of the fact that the emphasis here is on Equity's jurisprudential and procedural peculiarities and distinctiveness from the general or Common Law, and argues that it is necessary to do so in order to facilitate a more precise analysis of the law, suggests an innate fetishism. Is this a problem?

Baudrillard noted that the 'term "fetishism" almost has a life of its own. Instead of functioning as a metalanguage for the magical thinking of others, it turns against those who use it and surreptitiously exposes their own magical thinking'<sup>52</sup>. Based on Baudrillard's account a degree of fetishism here is not denied but anticipated. On the one hand, this can be read in light of a general problem for modern theory to escape self-contradiction and constantly problematize itself<sup>53</sup>. On the other hand, for Baudrillard psychoanalysis is the only mode of critique able to escape the 'vicious circle' inaugurated by a surreptitious exposure to one's own magical thinking<sup>54</sup>. '[P]sychoanalysis has escaped this vicious circle', says Baudrillard, 'by returning fetishism to its context within a perverse *structure* that perhaps underlies all desire', hence it 'avoids any projection of

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<sup>52</sup> Jean Baudrillard. 1981. *For a Critique of the Political Economy of the Sign*. Translated by Charles Levin. St. Louis: Telos Press Ltd., p.90

<sup>53</sup> Douzinas and Gearey, 2005, p.305

<sup>54</sup> Baudrillard, 1981, p.90

magical or transcendental animism, and thus the rationalist position of positing a false consciousness and a transcendental subject'<sup>55</sup>.

The very fact that this thesis focuses on Equity amid a far broader field of law is undoubtedly a fetishism of sorts. This is because Equity is afforded a degree of objective *devotion* (a key indicator of fetishism) that is not extended, for example, to other areas of civil justice. Treating Equity as such is, to echo some conventional accounts, to consider it discrete, a gloss on the law and thus to elevate it to a fetishistic prerequisite. In order to (re)claim Equity as a subject of criticism and inquiry, it is nevertheless necessary to stray into levels of objectification and to concede to some degree that Equity is an object worthy of special devotion within the broader spectrum of law and civil justice. Finally, as later chapters will discuss, there is also case to be made that the following thesis engenders a degree of neuroticism insofar as it is a legal academic project. Neuroticism within the legal community means directing expertise, knowledge and meaning to placing limits and constraints, seen as necessary, on economic existence, by defining laws that counterbalance and give particular form to economic existence within capitalism<sup>56</sup>. The neuroticism of the legal community is, therefore, an important complement to the perverse enjoyment sought by stakeholders, and, I argue, the two conjoin in structuring Equity fetishism as a fantasy of civil justice within the capitalist juridical-economic imagination.

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<sup>55</sup> Baudrillard, 1981, p.90

<sup>56</sup> Freud defines neurosis as key to notions of civilization and the creation of a degree of social utility that resonates, in some respects, with the ideas of Jeremy Bentham that will be discussed in Chapter 2. 'It was discovered that a person becomes neurotic', claims Freud, 'because he cannot tolerate the amount of frustration which society imposes on him in the service of its cultural ideals, and it was inferred from this that the abolition or reduction of those demands would result in a return to possibilities of happiness' (Sigmund Freud. 2001e. *The Future of an Illusion, Civilization and its Discontents and Other Works: The Standard Edition Volume XXI (1927-1931)*. Translated and Edited by James Strachey. London: Vintage, p.87)

# Chapter 1

## *The Conscience of Thomas More: An Introduction to Equity in Modernity*

### 1. Introduction

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In 1999, the same year that new Civil Procedure Rules impacting the prevailing notion of complete justice in the civil justice system were introduced, the Law Society Gazette polled members of the legal profession in the United Kingdom asking for nominations for the most influential and significant legal figure of the preceding millennium<sup>57</sup>. The poll sought an individual who crystallized greatness and embodied virtues in law, one who spoke equally to the closure of a millennium, to an age of transition occupied with root and branch changes in law, politics and the power brokerage of the social indicative of politico-legal reforms such as the *Human Rights Act* 1998 and the *Access to Justice Act* 1999. It is perhaps no surprise that the individual who emerged foremost in the Gazette's poll was one who represented a significant and formative tradition in British law, but also its human, conscientious and equitable side combined with a staunch and unwavering belief in authority. That individual was Sir Thomas More<sup>58</sup>.

A significant amount of ink has been spilt defending and attacking Thomas More since his death in 1535. Stories of More's achievements as to borrow Robert Bolt's infamous label, 'a man for all seasons', have created a powerful and deep-rooted mythology around the

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<sup>57</sup> Evlynne Gilvarry. 1999. Lawyer of the Millennium: Gazette Survey *The Law Society Gazette*, 24<sup>th</sup> November; see also: Lawyer of the Millennium [Online] Available at: [http://www.thomasmorestudies.org/rep\\_lawyer.html](http://www.thomasmorestudies.org/rep_lawyer.html) (accessed 20 Oct 2017)

<sup>58</sup> Rebecca Towers. 1999. Man for the Millennium, *The Law Society Gazette*, 17<sup>th</sup> December; see also: Lawyer of the Millennium [Online] Available at: [http://www.thomasmorestudies.org/rep\\_lawyer.html](http://www.thomasmorestudies.org/rep_lawyer.html) (accessed 20 Oct 2017)

man<sup>59</sup>. And like Roland Barthes' discussion of the eminent twentieth-century physicist Albert Einstein, has reified him for the benefit of future generations<sup>60</sup>. In the case of Einstein Barthes considered his brain as that 'object for anthologies, a true museum exhibit'<sup>61</sup>. In the case of Thomas More a candidate for exhibition in this mythological museum of super-human artefacts would undoubtedly be his *conscience*, to which, as Dennis Klinck remarks, More was 'notoriously devoted'<sup>62</sup>. It was this internalized faculty More used to significant public and private effect in his administrative and procedural activities as a statesman, lawyer and, crucially, Lord Chancellor of the Equity jurisdiction<sup>63</sup>. An analysis of Equity in modernity reasonably begins therefore not just with Thomas More, who remains in conjunction with notions of conscience a highly valued symbol of English law, but with the idea and implementation of conscience through Chancery as indicative of Equity's value to English law and valorisation by legal communities around the world. As the *Gazette* poll implied, it was the high moral integrity and authority of More's conscience that has represented an enduring pillar within the nation's legal tradition. This led *The Times* newspaper to further conclude that the former Lord Chancellor was the most likely representation the English people would give of a man who embodied all that was best in English civilization and history<sup>64</sup>. Further, that at his death, as John Guy claims, More had 'earned his place among the very few who have enlarged the horizon of the human spirit'<sup>65</sup>.

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<sup>59</sup> For example: Robert Bolt. 1996. *A Man for all Seasons*. Harlow: Heinemann

<sup>60</sup> Roland Barthes. 2000. *Mythologies*. London: Vintage

<sup>61</sup> Barthes, 2000, p.68

<sup>62</sup> Klinck, 2010, p.42

<sup>63</sup> J.A. Guy. 2000. *Thomas More*. London: Arnold, pp.1-18; Russell K. Osgood. 2006. Law in Sir Thomas More's *Utopia* as Compared to His Lord Chancellorship. *Thomas More Studies 1: Utopia*, pp.177-187; Travis Curtright. 2009. Humanist Lawyer, Public Career: Thomas More and Conscience. *Moreana*, Vol.46, No. 176

<sup>64</sup> *The Times*, 7<sup>th</sup> February 1978, quoted in Guy, 2000, p.17.

<sup>65</sup> J.A. Guy. 1980. *The Public Career of Sir Thomas More*. Brighton: The Harvester Press, p.203

The authority that More's conscience appeared to derive from a divine faith was aptly demonstrated through his legal practice. As Klinck maintains, for both More's successor Cardinal Wolsey and More himself 'conscience remained front-and-centre as far as Chancery was concerned'<sup>66</sup>. More was not simply an advocate for conscience in and through the practice of Chancery Equity during his time, however, but, I argue, a key to its introduction into an early modern social ecosystem in which the legal, political and, increasingly, the economic intermingled. More's time, on the cusp of the Reformation, saw the medieval order 'yielding to an intellectual and economic revolution', and Christendom 'rent by the divisions between Protestant and Catholic'<sup>67</sup>. Thomas More's conscience smashed with devastating effect against these first brutal vestiges of modernity and it cost him his life. By the same token, however, More introduced Equity into modernity by, for example, insisting on the use of injunctions 'to prevent unconscientious use of legal rights', a form of proto unconscionability that, as we will see throughout this thesis, remains central to, and for some a particular feature of, the problem of Equity's perceived flexibility and discretion<sup>68</sup>.

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<sup>66</sup> Klinck, 2010, p.43

<sup>67</sup> John Cardinal Wright. 1976. Saint Thomas More, patron of Lawyers and Model for Our Changing Times. *Moreana*, No. 51 (September), p.98

<sup>68</sup> Harold Potter. 1931. *An Introduction to the History of Equity and its Courts*. London: Sweet & Maxwell, p.45. The extent of the flexibility and discretion of Equity is widely debated and often discussed in terms of the level of containment of flexibility *within* the rules-based framework and by the points at which rights arise. As Alison Dunn maintains in her discussion of *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472, despite the view of 'Equity as one in which good morals, ethical justice, duties and reason hold sway, the location of its operation is often within tightly construed property principles' (Alison Dunn. 2012. *National Provincial Bank Ltd v Ainsworth* (1965). *Landmark Cases in Equity*. Edited by Charles Mitchell and Paul Mitchell. London: Bloomsbury, p.580); see also: Lord Eldon LC in *Sheddon v Goodrich* (1803) 8 Ves 481 at 497; Langton J in *Greenwood v Greenwood* [1937] P 157 at 164; Lord Neuberger in *Chukorova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, at 97 and 98

## 2. Conscience and Moral Authority

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Examining More's conscience as both mythical and historical provides a conceptual bridge between early modern Equity and its present form in the twenty-first century. This is not to suggest that More was or is solely responsible for Equity's character throughout modernity. Metaphysical conceptions of Equity that define it as an *ideal* or *principle* and which find early formulation, primarily, in Aristotle, were filtered through Christian doctrine and attached resolutely to the type of conscience understood by More<sup>69</sup>. But based on his strong adherence to the power of conscience in public life, and notably as Chancellor, More's impact on the history of Equity lies in his contribution to a form of civil justice adjudication directed by conscience and permeated by a significant moral ethos. What Ralph A. Newman has defined with regard to contemporary Equity as, 'the expression of standards of decent and honourable conduct which are the mark of a morally mature society'<sup>70</sup>.

More's conscience engendered a particular form of authority that he sought to impart in the world, one informed greatly by faith and Catholic doctrine. More's conscience was directed towards enforcing the will of God and the Church, and led him, for example, to expend a great deal of energy rooting out, convicting and executing heretics in the years

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<sup>69</sup> Following Aristotle's conception of Equity (see for example: Aristotle. 2009. *Nicomachean Ethics*. Translated by David Ross. Oxford: Oxford University Press, p.99), it was Christian authors including Thomas Aquinas and Jean Gerson that would provide the substantive arguments for its authority that underpinned More's thinking. See: Timothy O. Endicott. 1989. The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity. *Toronto, Faculty of Law Review*, Vol. 47, No. 2, pp.549-570

<sup>70</sup> Ralph A. Newman. 1973. The General Principles of Equity, in *Equity in the World's Legal Systems: a Comparative Study (dedicated to Rene Cassin)*. Edited by Ralph Newman. Brussels: Établissements Émile Bruylant, p.599



prior to his Chancellorship<sup>71</sup>. Later, conscience was the moral principle which gave Chancellor More 'the cognitive and coercive authority to pronounce decisions in his courts and bind litigants to observe them', and was defined by More as a form of authority and power able to elicit consensus among individuals<sup>72</sup>. W.S. Holdsworth describes this period as one in which 'the common law became more rigid, and less closely connected with the person of the king, the stream of equity ceased to flow through the channel of the common law courts, and began to flow through the channel of the Council and the Chancery'<sup>73</sup>.

Based on the confession of Sir George Throckmorton to Henry VIII in October 1537, Guy describes how 'More wanted to be remembered not for *Utopia* or his achievements as Lord Chancellor, but for his stand against Henry VIII'<sup>74</sup>. A stand that More principally orientated around his silence in the face of the King's desire – a desire to divorce his first wife, Catherine of Aragon, and a desire to remarry against the will of the Pope and the Catholic Church, to whom More was a resolute devotee. Yet, that same conscience in the hands of the inquisitor-More, a side of his character some commentators have suggested he might have shared with Nazis, made it a tool of discretion and arbitrariness which he used to define and fanatically hunt his own pre-conceived notions of evil<sup>75</sup>. This was More's conscience-in-action which, cast in both positive and negative lights, although admittedly by contemporary standards, revealed a degree of duality and stark paradox.

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<sup>71</sup> More's role as inquisitor and persecutor of what the Catholic Church perceived to be heretics (Lutherans in the main) has played a significant role in many of the revisionist histories of recent years. Whilst these histories serve to reformulate the ways in which More's conscience is perceived and alters the complexion of his Chancellorship, his role as a heretic-hunter, a mission he conducted via the Star Chamber rather than Chancery, can be viewed for present purposes as something separate from his role vis-à-vis Equity.

<sup>72</sup> Guy, 1980, p.43

<sup>73</sup> W.S. Holdsworth. 1925. *Sources and Literature of English Law*. Oxford: Clarendon Press, p.178

<sup>74</sup> Guy, 2000, p.21

<sup>75</sup> See for example: Jasper Ridley. 1982. *Statesman and Fanatic: Thomas Wolsey and Thomas More*. London: Constable

On the one hand, there was his stand against the King whose actions and fevered desire threatened the socio-political basis of the nation; and on the other a spurious rationale supporting the torture and murder of so-called 'heretics'. More, like the dualities of Equity, was both authority and an 'anti-legal element', a kernel of discretion at the heart of a system of law and governance in which forms of incremental formalism and rule-compliance underpinned by precedent were becoming the norm<sup>76</sup>.

As a divine moral authority More's conscience had long taken aim at forms of authoritarianism, including by enabling 'abstract justice to be done in individual cases, at the cost of dispensing (if necessary) with the law of the state'<sup>77</sup>. Thus it appeared to transcend the boundaries of the various offices of law and state that he held during his life. Further, More did not claim conscience as a personal standard 'but an objective one', hence its independence from 'the king's prerogative or the individual magistrate'<sup>78</sup>. Harold Potter maintains that the ecclesiastical Chancellors, of which More was arguably the last in vocation and spirit if not exactly in training, 'tended naturally to derive their ideas from the conceptions of the canonists. These conceptions depended upon the theory that the law of God governed the universe, and hence His law and the law of nature and reason, which were nearly synonymous, predominated the rules of any State'<sup>79</sup>. When applied to the theory of transcendentalism that accounts for More's application of conscience as a devout Catholic, statesman and lawyer, therefore, it is clear from Potter's claim that what anchored More was situating, indeed deeply rooting, conscience in faith.

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<sup>76</sup> 'Anti-legal' was a definition of the nature of Equity made by the twentieth century jurist Roscoe Pound. See: Roscoe Pound. 1905. The Decadence of Equity. *Columbia Law Review*, Vol. 5, No. 1 (Jan), pp. 20-21

<sup>77</sup> Guy 2000, pp.186-208; Holdsworth, 1925, p.179

<sup>78</sup> Fortier, 2005, p.102

<sup>79</sup> Potter, 1931, p.37

Shaped by the teachings of the Catholic Church, More's conscience provided him with a single point of reference for his actions.

A backdrop to the shifts in the socioeconomic and political landscape of Tudor England remained, for More, faith and the laws of God. And the ways in which faith manifested in More's Equity brings to mind two determinations that are of particular relevance to the discussion that will be conducted later in the thesis, but that warrant a brief introduction here. Firstly, and following Pierre Teilhard de Chardin, faith in its theological sense has an operative power, by which is meant an efficacy to prayer that is both tangible and certain in the world. As de Chardin suggests, in a manner that resonates with descriptions of the moral authority of More's conscience discussed here, '[a]ll the natural links of the world remain intact under the transforming action of 'operative faith'; but a principle, an inward finality, one might almost say an additional soul, is superimposed upon them'<sup>80</sup>. The second takes a more secular account of faith symptomatic of that element which modern idiomatic parlance conveys upon the efficacy of the bureaucrat when it is said that they go 'the extra mile', or, 'above and beyond the call of duty'. In this sense bureaucracy is able to transform the prosaic and every day into the extraordinary, enjoyable and desirable.

The influence of Catholicism contributed to More's promulgation of the intellectual tradition of Equity as a paternal order. Pierre Legendre maintains a continuing significance of this principle of paternity to the procedural juridical structure in a manner that would not have been unrecognisable to More, dominated as it was, and to large

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<sup>80</sup> Pierre Teilhard de Chardin. 1964. *Le Milieu Divin: An Essay on the Interior Life*, London: Fontana, pp.135-136

extent still is, by the centrality of a judge-cum-father-(confessor)<sup>81</sup>. Despite Legendre's focus on Roman Law, a civil law system that Guy maintains presented little danger of supplanting or countermanding the Common Law system during the Tudor period, the position of the paternal figure operating as both external, public judge and internal, private father-confessor is closely allied with the image of More as Chancellor<sup>82</sup>. More undertook both formal, morning sittings as a judge in Chancery and Star Chamber, as well as an open hall confessional at his home in Chelsea in the afternoon so he might allow litigants to, 'more boldly come to his presence'<sup>83</sup>. More was viewed (and viewed himself) in this sense as a 'family man' who garnered respect not only from his wife and children, but the extended family of litigants who sought his counsel, wisdom and discretion, but perhaps above all, the divine moral authority his conscience might impart. William Roper, More's son-in-law, highlights this view of More in his book, *Life of Sir Thomas More*<sup>84</sup>. And More himself acknowledges this paternal role and duty in an illustration of domesticity that implies a belief in principles that extend far beyond his home life:

You see, when I come home, I've got to talk to my wife, have a chat with my children, and discuss things with my servants. I count this as one of my commitments, because it's absolutely necessary, if I'm not to be stranger in my own home. Besides, one should always try to be nice to the people one lives with, whether one has chosen their company deliberately, or merely

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<sup>81</sup> Pierre Legendre. 1997. *Law and the Unconscious: A Legendre Reader*. Edited by Peter Goodrich. Translated by Peter Goodrich with Alain Pottage and Anton Schütz. Basingstoke: Palgrave Macmillan; Guy, 2000, p.171

<sup>82</sup> J.A. Guy. 1977. *The Cardinal's Court*. Hassocks: The Harvester Press, p.131

<sup>83</sup> William Roper. 1626. *Life of Sir Thomas More*. [Online] Available at: <http://www.fordham.edu/halsall/mod/16Croper-more.asp> (accessed 31 Oct 2013)

<sup>84</sup> Roper, 1626

been thrown into it by chance or family-relationship – that is, as nice as one can without spoiling them, or turning servants into masters<sup>85</sup>.

The extent to which More's legacy of conscience – his legacy of a moral ethos underpinning general equitable principles and doctrines of *inter alia* honourable conduct – functions within contemporary capitalist civil justice in ways that reflect More's intellectual tradition is highly questionable. His mythology offers a conceptual bridge between Equity then and now, but the socioeconomic and political contexts in which Equity exists alters and this is the key, if not exclusive variable, that is able to account for the nature of Equity. Yet, Equity fetishism demonstrates, as later chapters will show, that, whilst the language of conscience remains extant in contemporary civil justice, as a basis for Equity's reasoning and adjudication the idea and meaning of conscience has been transformed by the demands of economic reason. In place of conscience as a rich form of human moral reasoning that More understood it as, there is a hollow moral authority rooted, for instance, in the materiality of the property concept and the abstract provision for wealth creation that concept engenders.

It is important at this point to recognise that the dialogue between socioeconomic and political factors and the themes of conscience, Equity and civil justice are key, but that that dialogue is not only contemporary. John Guy, F.W. Maitland and others posit More as a key figure during a crucial and transitional phase in Equity's history, a "sea-change" as Dennis R. Klinck suggests<sup>86</sup>. In order to understand Equity fetishism, therefore, More is of crucial importance. Equity in modernity exists on the cusp of two worlds. The first remains an ideal and intellectual project, a utopian Equity balancing out the need for

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<sup>85</sup> More's letter to Peter Gilles in the preface to: Thomas More. 1965. *Utopia*. Translated by Paul Turner. Harmondsworth: Penguin, p.30

<sup>86</sup> Klinck, 2010, p.44

certainty in rule-making with the need to achieve fair results in individual circumstances through measures of discretion, agility, adaptability and flexibility. The second is a world in which Equity is a systemic and systematic machine of codification, precedent and rule, in which institutionalised moral capacities are those of brute economic and commercial efficiencies and cost-effectiveness. The disjuncture between these two worlds is something that will become more apparent in later chapters. More's conscience, however, is a window through which can be viewed the emergent internal divisions within civil justice and elasticities within Equity in particular that have been so effectively exploited under capitalism for the benefit of stakeholders.

### 3. More's Sacred Adjudication of Profane Equity

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Nicholas Phillip's bill complained that although four out of five feoffees to his use were willing to execute their estate to him, one John Lilley had refused against 'all right and conscience'. Having neither 'ability nor power' to enter, and having no remedy at common law, the plaintiff begged More to compel Lilly to agree with his co-feoffees. No degree is extant in the case, but a writ of *subpoena* was issued, ordering the defendant's immediate appearance in Chancery to explain his alleged breach of trust<sup>87</sup>.

More's ascendancy to the high office of Lord Chancellor and the subsequent impact this office had upon Equity and civil justice is marked by two major factors. Firstly, More was born into a family with traditions firmly rooted in the law<sup>88</sup>. Informed by this genealogy his becoming a lawyer was all but determined at birth and by late youth he was on track for a powerful legal career. Secondly, the indelible mark left on More and the wider legal landscape from the Tudor period onwards by his predecessor as Lord Chancellor, the

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<sup>87</sup> Case report quoted in Guy, 1980, p.55

<sup>88</sup> More trained as a young lawyer in much the same way as his contemporaries at Lincoln's Inn and had followed his well-respected father, the Chief Justice, John More, into the profession. As David Lloyd proclaims at the opening of his account of More: 'Thomas More was half way Chancellor, when born to Sir John More [...] The father's prudence, wit, and nobleness flowed with his blood to the son's veins', (David Lloyd. 1766. *State-worthies, or, the Statesmen and Favourites of England from the Reformation to the Revolution*, Vol. 1. London: J. Robinson [Online] Available at: <https://books.google.co.uk/books> (accessed 20 Oct 2017)).

formidable, ambitious, and in the end despised, Cardinal Wolsey<sup>89</sup>. Guy has suggested that the policies and procedures developed by Wolsey during his fourteen years as Lord Chancellor - many of which echo Legendre's principle of paternity discussed above – were highly influential and, crucially, continued by More following the Cardinal's disgrace in 1529. On Wolsey, Guy maintains that:

As Lord Chancellor, he insisted that litigants should be allowed to present their complaints, if necessary, to him personally. His system was largely of his own creation. He expected suitors to follow the procedures he laid down, to submit to independent arbitration wherever possible, and to be governed by the golden rule of equity: 'Do as you would be done by' – as Christ himself commanded in the Sermon on the Mount<sup>90</sup>.

Wolsey has a large part in the story of More's Equity, in this, there is no doubt. Potter describes Wolsey as the 'last of the succession of great ecclesiastical Chancellors who had built up a jurisdiction capable of great elasticity, and founded upon peculiar principles, dependent as they were primarily upon conscience rather than external acts'<sup>91</sup>. It is nevertheless important that More trained and practised as a lawyer for a number of years prior to his Chancellorship because this means he differed from the prelate Wolsey by virtue of his investment in law as a profession.

More's devotion to the Catholic Church provided a constant backdrop to his every word and deed as a lawyer, so even though he may have loved the King and the law, he

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<sup>89</sup> As David Lloyd outlines in his *State-worthies*: '[Wolsey] died unpitied, because he had lived feared; being the great bias of the Christian world. (Lloyd, 1766, p.31)

<sup>90</sup> Guy, 1980, p.131

<sup>91</sup> Potter, 1931, p.43

ultimately had only one master, God<sup>92</sup>. Indeed, so strong was his devotion to God and the Catholic Church that many, including his father, an eminent Common Law judge, believed it would draw him away from practising law and into the priesthood<sup>93</sup>. Whilst still a young lawyer, following his day-time observance at the courts of Westminster Hall and the necessary socialising in the collegiate atmosphere of Lincoln's Inn, More would regularly decamp to the contemplative surrounds of Charterhouse. Then on the very fringes of the City of London Charterhouse was a place 'for men who sought asceticism, poverty, solitude and lifelong chastity [...] a place for men who were willing to detach themselves from the pursuit of pleasure, estates, riches and titles'<sup>94</sup>. This was a practice that More continued as an elder statesman and Chancellor, although eventually only in a private chapel called the New Building in close proximity to his house in Chelsea.

Charterhouse was the very antithesis in temperament and tempo to Westminster Hall, as well as to the proprietary and material assertions and aspirations of the types of litigant More encountered during his legal career and especially as Lord Chancellor. Religion remained a powerful and influential guiding hand in society at this time. But the first vestiges of a wider public interest in property was clearly beginning to show, and in a telling parallel with the nineteenth century (the focus of the next chapter of this thesis) this made the sixteenth century, what R.H Tawney has called, both an age of social speculation and social dislocation<sup>95</sup>. Capitalism as a dominant social and political idea and force was yet to be realised and certainly nothing resembling the latter commercial

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<sup>92</sup> Steven D. Smith. 2003. Interrogating Thomas More: The Conundrums of Conscience. *University of St Thomas Law Journal*, Vol. 1, No.1 (Fall), p.581 – 'More was a paragon of piety in its various dimensions'; Robert Keane. 2004. Thomas More as a Young Lawyer, *Moreana*, Vol.41, 160 (Dec.), p.71; Osgood, 2006, p.185 – 'More was a cruelly divided man, meaning he was torn between his desire to serve the Crown and his own wish to prepare for heaven'

<sup>93</sup> Keane, 2004, p.51

<sup>94</sup> Keane, 2004, p.52

<sup>95</sup> R.H Tawney. 1990. *Religion and the Rise of Capitalism*. London: Penguin, p.76



form capitalism would assume in conjunction with Enlightenment thinking<sup>96</sup>. Yet the seeds of both great theories of modernity were expanding their roots in More's world, and during the period of More's Chancellorship, the ground was prepared for the arrival of capitalism. During his relatively short time as Chancellor, for example, More oversaw a sharp increase in the business of Chancery, albeit an increase that began under Wolsey, the majority of which involved disputes over real property and chattels real<sup>97</sup>.

As the first lawyer in one hundred and fifty years to become Chancellor, More inherited Wolsey's robust ecclesiastical traditions which coloured the office as one of mediation between the sacred institutions of the church and the profane institutions of the law. But as a lawyer, More's view of Equity was equally subject to an intellectual legal tradition not shared by Wolsey. Indeed, what distinguished More's Chancellorship from Wolsey's might be argued to be More's emphasis upon tighter and more efficient forms of bureaucracy. 'Whereas Wolsey had been hubristic and relaxed about justice' Guy claims, 'More tightened up the practical procedures'<sup>98</sup>. More highlighted this distinction, as a lawyer rather than prelate, in the speech he gave at his trial for treason for failing to support Henry VIII's move away from the papal authority of Rome, when he thanked his King for placing him in so high an office as that of Chancellor, 'that he never did to temporal man before'<sup>99</sup>. As both a young lawyer and senior servant of the King, More's temporal and spiritual life coalesced in his professional guise, as a human *corpus aequitas* that was, for a time, mirrored in and exercised through his command of Chancery Equity. This characterization of More is perhaps most recognizable in the ambivalence of his

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<sup>96</sup> Ellen Meiksins Wood argues that: 'The Enlightenment is typically conceived of as a, if not the, major turning point in the advance of modernity, and the conflation of modernity with capitalism is most readily visible in the way theories of modernity connect the Enlightenment with capitalism' (2017, p.183)

<sup>97</sup> Guy, 1980, p.50

<sup>98</sup> Guy, 2000, p.218

<sup>99</sup> Sir Thomas More's Speech at his Trial. 1535. [Online] Available at: <http://www.luminarium.org/renlit/moreddefense.htm> (accessed 28th October 2013)

features, at once unyielding and compassionate, in the famous portrait by Hans Holbein the Younger in 1527 - painted, it is also worth noting, shortly before More became Chancellor.

The role of the Catholic Church (as well as the beginnings of Protestantism<sup>100</sup>) in the day-to-day life of civil justice under More's Chancellorship was significant. As was the influence of Canon Law, which proved a major battleground between More and another key figure in the development of Equity during this period, Christopher St. German<sup>101</sup>. 'St. German's [*sic*] studies in the canon law, and his knowledge of English law, naturally led him to interest himself in the development of equity', maintains Holdsworth, 'which, up to this time, had been closely connected with the canon law, because it had been mainly developed by the ecclesiastical Chancellors', notably Wolsey and to a lesser extent More<sup>102</sup>. The divide between a spiritual and temporal law that each man represented in the field of Equity is encapsulated by the very words and language that Equity was seen and expected to communicate<sup>103</sup>. 'More would have transformed the common law', argues Timothy Endicott, 'where St German would transform the chancellor's equity'<sup>104</sup>. More's famed oppositional dialogue with Christopher St. German centred on the latter's book, *Doctor and Student*, a text that framed secular conceptions of Equity for generations

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<sup>100</sup> Even as More accepted the Great Seal and the office of Chancellor, the Reformation Parliament of 1529 was taking its seat and the inseparability of legal, political and religious interests of rival hues bound up in the activities of State was to become all the more acute, spearheaded by Henry VIII's unremitting desire to break free of his marriage to his Queen, no matter the extremity of action that would entail, and a level of anticlericalism advocated by the Common's (Guy, 1980, pp.110-125)

<sup>101</sup> In spite of the pervasive role of churchmen in shaping Equity and Chancery up to and in many ways including More, it is worth noting that, as Richard Hedlund claims, the 'exact influence of canon law on English equity is subject to debate. There was not a direct translation from the ecclesiastical courts into Chancery, but there are some stark similarities, in terms of both substantive and procedural rules' (Richard Hedlund. 2015. The Theological Foundations of Equity's Conscience. *Oxford Journal of Law and Religion*, Vol. 4, Issue 1, p.123)

<sup>102</sup> Holdsworth, 1925, p.186

<sup>103</sup> More's devotion underpinned a particular and powerful belief in Canon Law as the true Law of Christendom; J.A. Guy. 1984. Thomas More and Christopher St. German: The Battle of the Books. *Moreana*, XXI, 83-84 (Nov.), p.14

<sup>104</sup> Endicott, 1989, p.567

and bring More's brand of conscience and sacred adjudication into question<sup>105</sup>. 'On one side of the transition from spiritual to temporal supremacy lay the shattered and increasingly subordinate jurisdiction of spiritual law', argues Peter Goodrich, and the 'distinction is signalled most powerfully in the debate between Sir Thomas More and Christopher St German'<sup>106</sup>.

The importance of *Doctor and Student* is well noted in historical discussions of the formation of modern Equity, and its endurance as one of the first legal textbooks is evidence of this. As Franklin Le Van Baumer states, *Doctor and Student* functioned as 'the basic handbook for law students up to the time of Blackstone', by which time the systemization of Equity, not least due to the increasing influence and authority of a nascent capitalism, was achieved and the type of Equity More had fostered and celebrated greatly denuded<sup>107</sup>. Contrary to More, St German stipulated a role for conscience in Equity as one that did not rely on the Catholic imagination, but was 'consistent with the ordinary law' and grounded in the 'law of reason, the law of God, and – particularly significant for his project – the law of man'<sup>108</sup>. By the eighteenth century, William Blackstone had laid down directions and guidance as to the proper function of the Common Law courts in his *Commentaries* in a clear rebuke to the role of conscience in adjudication that may not precisely echo St German's work but is certainly built on its foundation as a rejection of More's reasoning. Thus while Blackstone seized upon systemization of the law as the aim in his time, it was arguably a continuation of the project of reconciling Christendom with the modern law that St German turned his

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<sup>105</sup> Holdsworth, 1925, p.185; Guy, 1984, pp.5-25

<sup>106</sup> Goodrich, 1996, p.16

<sup>107</sup> Franklin Le Van Baumer. 1937. Christopher St. German: The Political Philosophy of a Tudor Lawyer, *The American Historical Review*, Vol. XLII, No. 4, (July), p.631

<sup>108</sup> Klinck, 2010, p.50 and p.56

energies to by removing conscience 'as the motive force in equity' and thus provoking a new level of secularization<sup>109</sup>. The foundations St German laid are thus in evidence in the following passage from Blackstone:

For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always

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<sup>109</sup> Endicott, 1989, p549; Goodrich, 1996, p.17 – 'the principle effect of his [St. German's] arguments was to insist upon the right of the common law to incorporate or to subsume the spirituality. It is not that the spiritual jurisdiction should be removed or abandoned but rather that it be transferred so as better to reflect the 'true state of English law'.

intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded - *Non omnium, quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum quae constituuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, subvertuntur*<sup>110</sup>.

As Holdsworth points out, for St. German in the sixteenth century ‘when the rules of the common law were still fluid, and the rules of equity were still more so, it was possible that changes in common law rules, which made recourse to equity no longer necessary, would enlarge the jurisdiction of the common law courts and curtail the jurisdiction of the court of Chancery. This was not possible’, concludes Holdsworth, ‘in the middle of the eighteenth century’<sup>111</sup>.

Dennis Klinck cautions against viewing St German as the ‘harbinger of a new age of equity’ however, as his position was ‘hardly an abrupt departure from medieval concepts’ and he was as much ‘the inheritor and perpetuator of an old tradition as he was the progenitor of a new one’<sup>112</sup>. In spite of their differences, therefore, More and St. German both contemplated Equity and Common Law as much through the stained glass of the nave window, as from the ‘crib’ in Westminster Hall from where law students and young lawyers watched proceedings in all three of the main courts: Common Pleas, King’s Bench, and Chancery<sup>113</sup>. Lawyers like More and St German were men ‘who were by no

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<sup>110</sup> William Blackstone. 2009. *Commentaries on the Laws of England Book I*. [Online] Available at: <https://www.gutenberg.org/files/30802/30802-h/30802-h.htm> (accessed 19 June 2018) at 69 and 70

<sup>111</sup> W.S. Holdsworth. 1929. Blackstone’s Treatment of Equity. *Harvard Law Review*, Vol. 43, No. 1 (November), p.14

<sup>112</sup> Klinck, 2010, p.51

<sup>113</sup> Keane, 2004, pp.43-44

means barren of piety and religion', and the figure of More as a lawyer is especially difficult to separate from the figure of More as a deeply pious man<sup>114</sup>. During his declaration upon being made Lord Chancellor More claimed he would, 'serve his majesty, but he *must* obey his God: he would keep the king's *conscience* and his *own*'<sup>115</sup>. And in Roper's *Life* there is expressed the notion that the Court of Chancery was the place that More's private and public virtues converged; a public theatre for the expression of More's proto-saintliness that allowed it to achieve a firm grip on the popular imagination of the time<sup>116</sup>.

More was a dedicated and effective Chancellor, and evidence for both of these things exists in the records of the suits that came before him. A dedication that was much needed if the records are to be believed. As Guy suggests More was presented with 2,356 suits in the thirty-one months of his office, an average of 912 per annum <sup>117</sup>. 'More's suitability for the lord chancellor's judicial work had been an important consideration at the time of his elevation to office', Guy continues, 'and the official expectation that he would become energetically involved in the management of Chancery and Star Chamber was soon fulfilled'<sup>118</sup>. More was certainly a dedicated and perhaps somewhat fastidious bureaucrat, concerned with each and every detail of the causes that came before him and the accuracy and efficiency of their disposal<sup>119</sup>. More was, as a servant of the court, both willing and capable of confronting the rapidly increasing business of Chancery. A

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<sup>114</sup> Keane, 2004, p.59

<sup>115</sup> Lloyd, 1766, p.62

<sup>116</sup> Guy, 2000, pp.126-127

<sup>117</sup> Guy, 1980, p.50

<sup>118</sup> Guy, 1980, p.50

<sup>119</sup> Some of this fastidiousness can be seen More's letter to his friend Peter Gilles, reprinted in the introduction to *Utopia*, in which More talks of being, 'extremely anxious to get my facts right', when discussing with Gilles the finer detail of the world he has conjured in the book. (More, 1965, p.30)

jurisdiction, moreover, that was by his hand becoming increasingly distinct from the Common Law and forging its own peculiar forms of adjudication.

More inherited from Wolsey and continued to grow a very popular and sought-after institution in Chancery. ‘There has *always* been some sort of an effort to bring private law into line with what the public interest is currently thought to require’, argues Steve Hedley, in ‘medieval and early modern times, legislation was a poor tool for this, and common law autonomy from the rest of government was accordingly quite strong – the occasional legislative inroad into the common law could be dismissed as just an unimportant refinement of the common law system’<sup>120</sup>. An increasingly litigious fervour concerning property and land disputes that arguably anticipated civil justice adjudication under capitalism swept into More’s Chancery, but also stretched across the private (civil) and criminal law spectrum, from commercial disputes to false imprisonment<sup>121</sup>. This fervour needed an outlet that was more effective than the equivalent at Common Law, and to all intents and purposes, Chancery Equity was able to answer those needs. ‘The court of conscience would archetypically proceed according to rules of conscience and would apply the norms of a justice that transcended the temporal law and its positive procedures’, claims Goodrich, but more than that ‘the courts of spiritual justice existed alongside the community and process of common law, not simply to apply a separate law to the community of the ecclesiastical estate in its institutional sense, the clerics and all who could plead the privileged of the clergy, but also to provide a parallel set of rules for those who would seek some other justice than that available at common law’<sup>122</sup>. Equity

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<sup>120</sup> Steve Hedley. 2011. Is Private Law Meaningless? *Current Legal Problems*, Vol. 64, p.91

<sup>121</sup> Guy, 1980, p.50

<sup>122</sup> Goodrich, 1996, p.25. Chancery was a court that one might reasonably say was attuned to the demanding voice of the people and the community, therefore, which begs the question of precisely what changed socially and culturally in order for us to reach the form of commercialised Equity we arguably see today? This thesis points to the influence of capitalism and, among other things, its transformation of the idea of justice and the social contexts in which it resides as the clear answer to this question.

did not achieve this feat by directly contradicting the Common Law (the Courts of King's Bench and Common Pleas). Indeed, the practices of many lawyers at this time straddled both jurisdictions and it was not in their interests to undermine the other jurisdiction as such without inflicting damage upon themselves. As Guy explains, 'Wolsey's emphasis on Chancery and Star Chamber was only possible in the first place because he had secured the co-operation of many top common lawyers', and More continued to maintain this crucial, if somewhat paradoxical, relationship between the two jurisdictions<sup>123</sup>.

Equity's popularity, and the litigant's increasing desire for it, appeared to emerge from a simple fact of bureaucratic efficiency on the one hand, based on 'an independent body of rules regulating, among other things, the transfer and enjoyment of real property', where 'the Chancellor had taken on the mantle of an appellate court, meddling with the proceedings and reviewing the decisions of the common law courts according to principles of equity or conscience'<sup>124</sup>. But on the other hand from a pervasive and popular appreciation of Equity as an idea. There was, in other words, a sixteenth-century culture saturated in Equity as a 'powerful concept' that More would undoubtedly have appreciated and understood<sup>125</sup>. '[N]otions of equity play a prominent part in discourses that have or seek to have influence on major social conflicts and issues', Mark Fortier explains, continuing:

Equity appears in conjunction with other powerful notions, supporting them or simply accompanying them. Some of these notions – god, king, conscience, the people – may be more ubiquitous than notions of equity, but equity is their companion and is often deeply connected with the ideas

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<sup>123</sup> Guy, 1980, p.40

<sup>124</sup> Georg Behrens. 1998. An Early Tudor Debate on the Relation between Law and Equity. *Legal History*, Vol.19, No.2 (August), p.144

<sup>125</sup> Fortier, 2005, p.2



that matter most. At times equity takes on a relation of identity with such ideas: god's law is equity, as is the king's law; the Christian conscience is guided by equity; the welfare of people is equity. In the realm of early modern ideas, equity moves in the highest company<sup>126</sup>.

As a popular institution, the Tudor Chancery, as we have seen, offered an alternative forum for adjudication and remedy otherwise unavailable at Common Law. This can also be interpreted, and importantly from the point of view of later discussions on fetishism, as a socio-legal response to a *lack* in the Common Law system that led to the 'mass defection' of litigants from the common law court to Chancery', which Georg Behrens argues, did not abate under More's Chancellorship but accelerated<sup>127</sup>. By exposing inadequacies in the Common Law and speaking its lack, More and the Equity of the Tudor Chancery ignited jurisdictional tensions that echoed throughout the evolving system of modern civil justice adjudication in England and Wales. Further, Equity's undermining of the Common Law in matters of civil justice, both procedural and doctrinal, created a basis from which Common Law was driven to counteract Equity's principles, thus systemically embedding tensions between the two jurisdictions in the centuries to come<sup>128</sup>. Sir Henry Maine points to Equity's claim to override the Common Law 'by supposing a general right to superintend the administration of justice' based on the paternal authority of the King as untenable<sup>129</sup>. 'The growth of the English constitution rendered such a theory unpalatable after a time', argues Maine, 'but, as the Jurisdiction of the Chancery was then firmly established, it was not worth while [*sic*] to devise any

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<sup>126</sup> Fortier, 2005, p.2

<sup>127</sup> Behrens, 1998, p.144

<sup>128</sup> Behrens, 1998, p.144

<sup>129</sup> Sir Henry Maine. 1972. *Ancient Law*. London: J.M. Dent & Sons Ltd., p.42

formal substitute for it'<sup>130</sup>. And the reason that Chancery was so established in modernity, following More's Chancellorship, was in many respects, as this chapter has argued, due to More.

## 4. Conclusion

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Under More's Chancellorship Equity functioned in harmony with the demands of its public, and the growing case-load of Chancery revealed a general and popular enthusiasm for its forms of civil justice over those of the Common Law courts. It is perhaps a testament to the bureaucratic skills and knowledge, but also the deeply-held faith of More that it appeared and functioned as such. The intellectual battle with St German paints a picture of More and his instance on the authority of conscience as antediluvian, making him a relic rather than a reformer, and thus difficult to reconcile with contemporary Equity and civil justice. Yet this is to underestimate the transformative effect More has had on the socio-legal imagination by virtue of a broader intellectual project, or perhaps mission, which encapsulated divine as well as humanist ideas.

More is, I argue, an important bridge between the sorts of inner life redolent of the practices of pre-capitalist divine ontologies and those of contemporary self-regarding ethics of humanist ontologies that anticipated both the Enlightenment and, more importantly, the rise of capitalism. More's time was, as R.H. Tawney maintains, a period 'seething with economic unrest and social passions'<sup>131</sup>. And even though he effectively lost his life to the passions that underpinned the Reformation and Henry VIII's schism with the Pope and Rome, More played a significant and central role, whether directly or in terms of the repudiation by others of his ideas and practices, in property's elevation to

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<sup>130</sup> Maine, 1972, p.42

<sup>131</sup> Tawney, 1990, p.142

an unconditional right and the development of a creed of the individual as ‘absolute master of his own, and, within the limits set by positive law, may exploit [property] with a single eye to his pecuniary advantage, unrestrained by any obligation to postpone his own profit to the well-being of his neighbours, or to give account of his actions to a higher authority’<sup>132</sup>. It was, in short, as Tawney maintains, ‘the theory of property which was later to be accepted by all civilized communities’<sup>133</sup>.

The intellectual underpinnings of More’s formulation of Chancery Equity were not limited to the divine, therefore, but included humanist ideas, and later invited humanist interpretations, which could be traced to the influence of mercantilism and philosophies in continental Europe<sup>134</sup>. More’s friend Erasmus, his counterpart in the Roman law system of France and a publisher of *Utopia*, Guillaume Bude, as well as via another notable European humanist scholar Juan Luis Vives, who was both a visiting lecturer at Oxford and sometime house-guest of More’s were all influential in his life and thinking. As Travis Curtright maintains, it seems certain that More was acquainted with humanist jurisprudence and that the centrality of Equity to humanist doctrines was important in More’s reasoning<sup>135</sup>.

In *Rhetoric* Aristotle says of Equity that, ‘people regard it as just; it is, in fact, the sort of justice which goes beyond the written law’<sup>136</sup>. More would almost certainly have been exposed to these Aristotelian ideas during his time as a student at Oxford in the early 1500s when waves of humanism were also washing ashore in England from the continent<sup>137</sup>. Indeed, More’s reflections on humanism and humanist ideas are peppered

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<sup>132</sup> Tawney, 1990, p.151

<sup>133</sup> Tawney, 1990, p.151

<sup>134</sup> Smith, 2003, p.581; Curtright, 2009

<sup>135</sup> Curtright, 2009, pp.81-83

<sup>136</sup> Aristotle. 2004. *Rhetoric*. Translated by W. Rhys Roberts. New York: Dover Publications, p.49

<sup>137</sup> Guy, 2000, pp.24-27

throughout his *Utopia*, and especially during his fictitious discussions with Raphael in Book I, where they exchange views on the quality and value of ancient Greek and Roman notions of justice<sup>138</sup>. It is in that sense, I argue, More's adjudication of Chancery Equity applied the sacred to the profane, a key duality in the history of Equity that has marked and shaped both it and civil justice since.

Under More's tutelage, Chancery Equity emerged as a juridical form desired rather than loathed or feared by those who sought its civil justice. More was a deeply spiritual lawyer and gatekeeper to the bounty of Equity in the sixteenth-century Chancery. But More's Equity and his moral authority was also objective, not least because his conscience told him so, which has made Equity a moral project with centuries of 'worrying at its core'<sup>139</sup>. Equity is said in contemporary legislation to prevail, but does so under a new God, a different master to the one More served: *capitalism*. And yet capitalism continues to carve out Equity as an object of devotion within the field of civil law, a fetish for those who seek it. For better or worse, More is part of this legacy and key to understanding Equity fetishism.

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<sup>138</sup> More, 1965, pp.37-68

<sup>139</sup> Alastair Hudson. 2014. *Great Debates in Equity and Trusts*. London: Palgrave, p.61

# Chapter 2

## *Economics of Reform or the ‘Plucked Rib’ of Equity*

### 1. Introduction

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‘If chancellors were Cardinals and Archbishops before the Reformation, and common lawyers afterward, it is easy to see that the theory and practice of equity had to change’, argues Timothy Endicott<sup>140</sup>. And whilst nineteenth-century chancery judgements ‘bear no reference to the safety of the plaintiff’s soul’ Endicott concludes, ‘the change demands closer examination, and particularly an answer to the question of how equity survived at all as a system outside the common law. Why was the institutional reconciliation delayed until 1873?’<sup>141</sup> The following chapter develops the theory of Equity fetishism by examining it as a phenomenon within the framework of broader philosophical, sociocultural, economic and political changes that occurred during the eighteenth and nineteenth centuries.

This chapter will assess Judicature and Chancery reform as it was ultimately made-out in the Parliamentary reports and records from the time, in order to further develop the argument that the reforms signalled a closer alignment between civil justice and the needs, desires and fantasies provoked by capitalism<sup>142</sup>. The examination of the

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<sup>140</sup> Endicott, 1989, p.557

<sup>141</sup> Endicott, 1989, p.557

<sup>142</sup> Two pieces of legislation broadly bookend the theory of civil justice this thesis proposes, and the source of that legislation was the reform agenda constructed in Parliament during the nineteenth century. The first being the *Supreme Court of Judicature Act 1873* (hereafter ‘the 1873 Act’), followed by the *Senior Courts Act 1981* (initially called the *Supreme Court Act*) (hereafter ‘the 1981 Act’). These and other pieces of legislation, including the *Supreme Court of Judicature Act 1875* and the *Supreme Court of Judicature (Consolidation) Act 1925* (hereafter ‘the 1925 Act’), act as stepping-stones in the history of Equity fetishism. Also of relevance are the Rules of the Supreme Court (‘RSC’), which, following the Woolf Reforms, became the Civil Procedure Rules after 1999. These rules fleshed-out the procedural role and place of Equity set

Judicature period is undertaken here less for the purposes of explaining the tension between the stringent rule-compliance and formalism of Common Law and the liberal approach of Equity as the basis of complete justice, than to explain what made unification, perfectibility and thus complete justice such powerful and necessary ideals and concepts in the minds of civil justice reformers during the nineteenth century and in the decades thereafter. If, as William Davies following Karl Polanyi states, the ‘achievement of nineteenth-century liberalism was to produce a sense of economic activity as separate from and external to social and political activity’, a point on which this thesis largely agrees, then the issue for this chapter, in highlighting the resurgence of capital as grounds for Equity fetishism, is to show how the civil justice reforms and ultimately ECJ fitted into this ‘achievement’<sup>143</sup>.

## 2. The pleasure, pain and *pannomion* of Jeremy Bentham

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It is important to account for the influence of Jeremy Bentham on the subject of this thesis, which is based here on two factors. Firstly, Bentham’s influence over law reform generally and thus Chancery reform as a species of it - ‘the founder of all legal reform’ as Bentham was enthusiastically referred to during the Parliamentary law reform debates in the 1830s<sup>144</sup>. Secondly, and specific to Equity and thus Equity fetishism, the influence of Bentham’s idea of ‘complete law’ or *pannomion* on the excretion of uncertainties (if not always a corresponding guarantee of certainties) from the substance and processes of the law, which has led commentators to speculate on whether he was the progenitor

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out in the Judicature legislation. Together this legislation and the formation of the RSC signal important stages in the evolution of the administration of civil justice since the nineteenth century.

<sup>143</sup> Davies, 2017, p.21

<sup>144</sup> *Law Reforms*. HC Deb 29 April 1830 Vol. 24 cc243-89 at 263

of Judicature reform and the fusion of Common Law and Equity<sup>145</sup>. 'The standard account of Chancery', argues Mark Fortier in his assessment of Equity and the law in Restoration and eighteenth-century England, 'is one of a Restoration regularization of principles and procedures after the wild and woolly early modern period before the inefficiency, stultification, and stagnation decried by Jeremy Bentham [...] became endemic'<sup>146</sup>. Further, Bentham's influence is important here because of what it tells us about the tensions produced by principles and ideology from without the law imposed upon the fundamental institutions and procedures of law. Specifically the exposure of civil justice (at this point in time still the bifurcated system of Common Law and Equity courts) to Bentham's ideas of utilitarianism and political economy more generally, and the tensions this created between conservative protectionism of law's institutions and a shifting liberal political class intoxicated by the promises of capitalism and increasingly subservient to the influence and the will of business and commerce<sup>147</sup>.

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<sup>145</sup> J.R. Dinwiddy. 1989. Adjudication under Bentham's Pannomion. *Utilitas*, Vol. 1, Issue 2 (October), pp.283-289; see also: Holdsworth, 1929, pp.20-21; James E. Crimmins. 2018. Jeremy Bentham. *The Stanford Encyclopedia of Philosophy*. Edited by Edward N. Zalta. [Online] Available at: <https://plato.stanford.edu/archives/sum2018/entries/bentham/> (accessed 20 June 2018) – 'a collection of codes that would constitute the utilitarian *pannomion*, a complete body of law based on the utility principle, the development of which was to engage Bentham in a lifetime's work and was to include civil, procedural, and constitutional law'.

<sup>146</sup> Mark Fortier. 2015. *The Culture of Equity in Restoration and Eighteenth-Century Britain and America*. Farnham: Ashgate, p.15

<sup>147</sup> Michael Lobban points to a particular instance between Lord Abinger and Lord Langdale during the 1830s and the first serious moments of the nineteenth century reform programme directed at Chancery, in which Abinger dismissed Langdale's ideas for reform of the office of Chancellor 'as Benthamite theory out of tune with practice' (Michael Lobban. 2004a. Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I. *Law and History Review*, Vol. 22, No. 2 (summer), p.419). More pointedly, in the Parliamentary speech Lobban is referring to, Lord Abinger, in what Lobban says is a reference to Bentham, claims that, 'ingenious gentleman [Bentham] maintained that speedy justice was so essential, that no system of judicature could be perfect unless there was one judge eternally sitting, so that when one was fatigued another should take his place. That certainly was the very perfection of theory. But human affairs would not admit of its application; he, therefore, must request his noble and learned Friend to mix up with his theory a little more of his experience in practice' (*The Appellate Jurisdiction*. HL Deb 13 June 1836, Vol. 34, cc413-86 at 475). The reference to 'perfection of theory' is of note in respect of Bentham's particular vision of complete justice and therefore, as this thesis claims, integral to the notion of perfection in terms of fantasy and fetishism.

Certainty and perfection were themes Bentham explored rigorously throughout his work, in part as a rebuttal to Blackstone's vision and 'mapping' of a system of laws in the *Commentaries of the Common Law and English Constitution*, which Bentham saw as expansive, flexible, yet elitist and overly focused on the demands of the King and of the aristocracy<sup>148</sup>. But also due to the growing perception of Chancery as dysfunctional. Thus the tendency outside of Chancery towards generalizing and universalising 'common equity was helping further political and social causes with which any progressive-minded person might sympathize', argues Fortier, 'within Chancery the movement was to delimit and order general equity for the sake of enclosing it within precedent and rule-based jurisprudence'<sup>149</sup>. Gerald Postema maintains that in contrast to critics like Bentham, others followed Blackstone too closely even as systemic issues with the Common Law troubled them. 'Unlike Bentham, these critics treat this bred-in-the-bone resistance to theory and system not as sufficient cause to raze the obsolete structure and replace it with a fully modern, rational, built-from-scratch code', states Postema, 'but rather, like Blackstone, to festoon its ancient, ramshackle ramparts with celebratory banners'<sup>150</sup>. For his part, as mentioned in Chapter 1, Blackstone followed Grotius in his interpretation of Equity in light of Aristotelian flexibility and adaptability based on that idea that, 'since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted'<sup>151</sup>.

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<sup>148</sup> Jeremy Bentham. 1864. *Theory of Legislation*. Translated from the French of Etienne Dumont by R. Hildreth. London: Trüber & Co, p.71; see also, Shirley Robin Letwin. 1998. *The Pursuit of Certainty: David Hume, Jeremy Bentham, John Stuart Mill, Beatrice Webb*. Indianapolis: Liberty Fund

<sup>149</sup> Fortier, 2015, p.16

<sup>150</sup> Gerald J Postema. 2014. Law's System: The Necessity of System in Common Law. *New Zealand Law Review*, Vol. 2014, No.1, p.70

<sup>151</sup> Blackstone, 2009, at 61



As the following passage shows, Bentham reserved a special level of vitriol for Blackstone's ideas, as well as for Equity:

In regard to the Law of England in particular, it is here that he gives an account of the division of it into its two branches (branches, however, that are no ways distinct in the purport of them, when once established, but only in respect of the source from whence their establishment took its rise) the *Statute* or *Written law*, as it is called, and the *Common* or *Unwritten*: an account of what are called *General Customs* or institutions in force throughout the whole empire, or at least the whole nation; of what are called *Particular Customs*, institutions of local extent established in particular districts; and of such *adopted* institutions of a general extent, as are parcel of what are called the *Civil* and the *Canon* laws; all three in the character of so many branches of what is called the *Common Law*: in fine, a general account of *Equity*, that capricious and incomprehensible mistress of our fortunes, whose features neither our Author, nor perhaps any one is well able to delineate; of *Equity*, who having in the beginning been a rib of *Law*, but since in some dark age plucked from her side, when sleeping, by the hands not so much of God as of enterprizing Judges, now lords it over her parent sister<sup>152</sup>.

'Bentham directed this analysis against a host of ethical propositions he sought to eliminate as competing alternatives to the utility principle', claims James Crimmins, 'such as "moral sense", "common sense", "law of reason", "natural justice", and "natural equity"'. All are dismissed on the grounds that they are merely empty phrases that

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<sup>152</sup> Jeremy Bentham. 1891. *A Fragment on Government*. Oxford: The Clarendon Press, pp.95-96

express nothing beyond the sentiment of the person who advocates them'<sup>153</sup>. Bentham's dislike of the uncertainty of language, including the language of Equity, as a contributory factor to a lack of coherence in Common law system, was central to his motivation for a complete law and complete code. Moreover, this insistence on systemisation, and especially its relationship to the problematic of Equity, in particular, remained a strong theme some two hundred years later in the work of Peter Birks<sup>154</sup>. We will discuss Birks in more detail later with regard to Equity and property, but for now it is worth noting the lineage between Bentham and Birks – as we did St German to Blackstone in Chapter 1 - as advocates for clarity and order as the bulwarks of certainty in law, a position that placed Equity as a jurisprudence of discretion and conscience on the wrong side of both men<sup>155</sup>.

Certainty and perfection of the law were clearly matters of economic and by extension social expediency and improvement for Bentham. In his introduction to *A Fragment on Government*, F.C Montague states that Bentham's ideal of codification of the law *qua* complete law was twofold: 'an advantage in assisting the study of the law and an advantage in assisting the administration of the law'<sup>156</sup>. He continues:

First, as regards the study of the law, Bentham believed that law once codified would be brought within the grasp of laymen as well as of lawyers; that every person of sound mind would be able to understand and to remember the provisions of the law. Secondly, as regards the

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<sup>153</sup> Crimmins, 2018

<sup>154</sup> Michael Lobban. 2014. Mapping the Common Law: Some Lessons from History. *New Zealand Law Review*, Vol. 2014, No.1, pp.21-67; Peter Watts. 2014. Taxonomy in Private Law - Furor in Text and Subtext. *New Zealand Law Review*, Vol. 2014, No.1, pp.107-144

<sup>155</sup> Postema, 2014, pp.69-70

<sup>156</sup> Bentham, 1891, p.50

administration of the law, Bentham believed that law once codified could be administered with certainty, with speed and with economy, since there would be little for judges to do when the application of law had been made so simple, and less for lawyers to do when every man would be able to conduct his own case. Codification, therefore, would make the knowledge of the law attainable by all, and the remedy for wrong endured accessible to all, and thus in one word perfect the legal development of society<sup>157</sup>.

The preface to *A Fragment on Government* begins with Bentham's assessment of the post-Enlightenment age through which he was living, on the cusp of the meteoric rise of industrial capitalism, as 'a busy age; in which knowledge is rapidly advancing towards perfection'<sup>158</sup>. And, therefore, Bentham's idea of complete law matters here because of the conjunction of law, property and economics that it represents – a theme that we will see developing in-step with the evolution of capitalism throughout the nineteenth, twentieth and twenty-first centuries.

Bentham recognised that power, and political power, in particular, was as much over things (property) as it was persons<sup>159</sup>. Moreover, that both had profound effects on subjective being (psychology), notably portrayed as an insistence on *pleasure, happiness*, as well as a striving for the reduction of *pain* in Bentham's utilitarianism and his ultimate regard for the purposes of law and the political will<sup>160</sup>. The avoidance of pain that Bentham is concerned with is notable here because it echoes the role, I claim, in the avoidance for the economic subject (stakeholder) of the trauma of castration that occurs

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<sup>157</sup> Bentham, 1891, p.50

<sup>158</sup> Bentham, 1891, p.93

<sup>159</sup> Bentham, 1891, p.186

<sup>160</sup> Bentham, 1864; see also: Jonathan Wolff. 1996. *An Introduction to Political Philosophy*. Oxford: Oxford University Press; Paul Kelly. 2003. Bentham. *Political Thinkers from Socrates to the Present*. Edited by David Boucher and Paul Kelly. Oxford: Oxford University Press, pp.307-323; Sorabji, 2014, p.76

within capitalism via Equity fetishism. This does make Equity fetishism a utilitarian theory but does reveal the *utility* inherent in fetishism and fantasy. In other words, Equity fetishism is symptomatic of the type of pain alleviation Bentham envisaged, as Paul Kelly maintains: 'In terms of his [Bentham's] psychology, pain and pleasure are intimately connected, but in terms of his practical application of this psychology to the science of legislation and government, pain is by far the more important consideration. *Whatever else it is that people want, they all want to avoid pain*' [emphasis added]<sup>161</sup>.

Francesco Ferraro points to the mitigation of pain in Bentham's theory being directly associated to mitigation of disappointment<sup>162</sup>. In other words, the legal system, as one branch of the utilitarian infrastructure maintaining the happiness of the individual, must provide means of overriding the strictness of laws where it is necessary to do so for the welfare of the individual. This notion of welfarism is important to note prior to the later discussion relating to the influence of Bentham on the law and economics models of neoliberal capitalism, because of its influence on that school of thought and, in particular, the work of Ronald Coase and Richard Posner. 'It is because Law and Economics combines Benthamite empiricism with a particular (Coasian) idea of free competition that it preserves a central feature of neoliberalism, and remains hostile to state interventions', argues Davies, 'it strives to square the circle between liberalism and utilitarianism, through an idiosyncratic appeal to the rationality of individual decision making'<sup>163</sup>. Bentham was, after all, according to Amanda Perreau-Saussine, 'a legal positivist who would count as a paradigm rationalist'<sup>164</sup>.

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<sup>161</sup> Kelly, 2003, p.311

<sup>162</sup> Francesco Ferraro. 2010. Direct and indirect utilitarianism in Bentham's theory of adjudication. *Journal of Bentham Studies*, Vol. 12, p. 2

<sup>163</sup> Davies, 2017, p.77

<sup>164</sup> Amanda Perreau-Saussine. 2004. Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist. *Cambridge Law Journal*, Vol. 63, No. 2 (July), p.348

Bentham's *pannomion* is therefore understood here as symptomatic of an alignment of legal reason to what Morris R. Cohen calls 'the Benthamite hedonistic psychology', a 'classical economic optimism that there is a sort of pre-established harmony between the good of all and the pursuit by each of his own self economic gain' in order to forge a complete civic juridical ideal<sup>165</sup>. Bentham understood law as establishing an 'expectation' with regards to property and its exploitation that accords fully, I suggest, with Cohen's portrait of 'economic optimism' as euphemistic of a resurgent capitalism<sup>166</sup>. 'Property and law are born together, and die together' states Bentham, and F.C. Montague remarks that for Bentham, 'when the law has once sanctioned expectations it is bound to uphold those expectations'<sup>167</sup>. Furthermore, in what functions both as a literal interpretation of the evolution of capitalism that Bentham would have been witness to in the eighteenth century, and a metaphor of the inherent exploitability of property that its privatization facilitated, he remarks on the protection the law provides in order for him to 'inclose [*sic*] a field, and to give myself up to its cultivation with the sure though distant hope of harvest'<sup>168</sup>. Enclosure, understood as lost access to the commons, was paradigmatic of the shifts in law and property ownership that the expansion of capitalism demanded, and one, moreover, methods and systems of private civil justice and governance enabled. 'Enclosure (when all the sophistications are allowed for) was a plain enough case of class

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<sup>165</sup> Morris R. Cohen. 1982. *Law and the Social Order: Essays in Legal Philosophy*. New Brunswick: Transaction Books, pp. 74-75. In his outline of the development of complete law in the English civil justice system from the nineteenth century onwards, John Sorabji gives particular attention to the effects of Bentham's 'utilitarian, consequentialist theory of ethics, known as welfare-hedonism' (2014, p.76)

<sup>166</sup> Bentham, 1864, p.112

<sup>167</sup> Bentham, 1864, p.113; Bentham, 1891, p.39. In contrast, R.H. Tawney describes the earlier objections Thomas More had strenuously made as Chancellor to initial moves towards and attempts at land enclosures, which shows the evolution of legal thinking within capitalism as accepting of the greater emphasis on private possession and ownership models (1990, pp.143-144)

<sup>168</sup> Bentham. 1864, p.112

robbery', argues E. P. Thompson, '*played according to fair rules of property and law laid down by a parliament of property-owners and lawyers*' [emphasis added]<sup>169</sup>.

Cohen further attributes the influence of Bentham to shaping a political theory of contractualism, 'that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely', a system supported in part by remedial counterpoints such as specific performance that Equity offers to shore-up such agreements and arrangements<sup>170</sup>. Contract, along with private property, is key to Equity's influence within capitalism and will be examined in greater depth in later chapters. But for now we are able, at least, to recognise that in conjunction with his enthusiasm for law reform, Equity was necessarily central to Bentham's broader social and philosophical ideas. And, therefore, as with the work of Peter Birks at the end of the twentieth-century, Bentham's expressions of aversion to Equity were arguably overstated and somewhat misguided. Bentham might have found Equity and encumbrance to his *pannomion* but he equally recognised that Equity was far too embedded in the landscape of the Common Law to dislodge, something nineteenth-century reformers, many of whom celebrated Bentham's ideas, would also discover.

### 3. The age of reform and capital

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Following the erosion of ancient feudal hegemonies and the absolute and divine authority of monarchs across Europe, a nascent middle class with increasing authority in Parliament on its side saw a retreat in 'the forces of conservatism, privilege and wealth',

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<sup>169</sup> E.P. Thompson. 2013. *The Making of the English Working Class*. London: Penguin Modern Classics, pp.237-238. Thompson further notes that: 'what was 'perfectly proper' in terms of capitalist property relations involved, none the less, a rupture of the traditional integument of village custom and of right' (p.238), in other words a new morality rooted in the ideals and laws of private property ownership that supplanted traditional social and political relations.

<sup>170</sup> Cohen, 1982, p.74

who latterly had to 'defend themselves in new ways', and the 'defenders of the social order had to learn the politics of the people'<sup>171</sup>. Confronted by members of a new liberalising socioeconomic class who refused to submit to the economic limitations of conservatism and the last vestiges of feudal traditions, led to uncertainty for the establishment forces. Uncertainty concerning their future dominance of the social order and many of its institutions and, equally, a degree of confusion with regard to their socio-political affiliations and identities<sup>172</sup>.

The politics of the people during this time evolved a spectrum of interests unmatched by any prior period in British politico-economic history as the restrictive yoke of limited suffrage was lifted and old entrenched lines dividing the social classes were rendered permeable due to the authority that opportunities for private property ownership afforded the liberal middle-classes. It was not, however, as Frederick Hayek following John Locke argues, simply the material aspect of property that was of importance but 'life, liberty and estates' that each individual had the right to pursue<sup>173</sup>. Hayek looks to the seventeenth century and John Milton for his confirmation of the deep and well-founded traditions of liberal property rights and ownership, as well as the rights to exploit that ownership for personal advantage, or as Milton puts it: the 'liberty to dispose and economise in the land which God has given them, as masters of family in their own inheritance'<sup>174</sup>. Jeremy Bentham, as we have seen, further underscored the onus on

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<sup>171</sup> Eric Hobsbawm. 1997. *The Age of Capital 1848-1875*. London: Abacus, p.39

<sup>172</sup> Whilst a significant growth in property ownership especially by the middle classes since the nineteenth century suggests the erosion of feudal-like traditions concerning property, where question marks remain regarding the extent to which such traditions have actually been undone is in terms of land. In particular, the ownership of land by private stakeholders versus the amount of acreage. For example, it has been suggested that whilst seventy per cent of land in the United Kingdom is subject to a private stake, this still only amounts to three out of sixty million acres (see: Kevin Cahill. 2011. The Great Property Swindle: why do so few people in Britain own so much of our land? *The New Statesman*. 11 March. [Online] Available at: <http://www.newstatesman.com/life-and-society/2011/03/million-acres-land-ownership> (accessed 16 June 2017).

<sup>173</sup> Hayek, 2013, p.102

<sup>174</sup> John Milton quoted in Hayek, 2013, p.159

private property and its inherent exploitability that would come to shape the fortunes of the burgeoning liberal middle classes in the eighteen and nineteenth centuries, through his framing of the 'established expectation' to be able to 'draw such and such an advantage from the thing possessed'<sup>175</sup>.

A politics of plurality became, for a time, the norm in nineteenth-century society, ranging from mass revolutionary stirrings of a new urban working class (proletariat); to the socialist and cooperative experimentations of Owenism and Chartism that followed in the wake of the French Revolution and other radical philosophies, notably the work of Saint-Simon; to cries from libertarians keen to impose their individualism and entrepreneurialism on the world and for greater shares of wealth through exploitable property rights. No matter how substantively divergent these points on the spectrum were, they were united in opposition to longstanding conservative values and traditions that were the preserve of a relatively small and highly privileged class of aristocratic landowners. For centuries this class had exclusive dominion over Chancery Equity, inasmuch as Chancery dealt, to a large extent, only with the interests, feuds and so on of those with enough property to warrant it. But when the liberal bourgeoisie demonstrated property interests and substantial claims of their own it became clear, at least to the bourgeoisie, that the prevailing system of civil justice comprised of separate sites of Equity and Common Law adjudication did not work in their favour. As we will see later in the chapter, the prevailing system of civil justice simply did not offer sufficient support to emerging forms of commercialism nor the increasing desire of the bourgeoisie to accumulate and secure rights and claims to property, money and therefore also power. Displeasure at the perception that Chancery was not commercially viable in its structure

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<sup>175</sup> Bentham, 1864, p.112



and function manifested in a variety of ways. For instance, in the view of the Chancery Commission established during the mid-nineteenth century to determine areas of reform, orders regulating Chancery's proceedings were considered 'ill-adapted to the type of business generated in a modern commercial society'<sup>176</sup>.

At the highest levels of legislative and executive power the taste for reform in order to dislodge the old order manifested itself during the early 1850s as the influence of the conservatives in Parliament began to wane and the imposition of progressive liberal ideas took root. As historian Sir Llewellyn Woodward suggests: 'The very names of parties were unstable for a time. The terms 'conservative-liberal' and 'liberal-conservative' came into use', and the 'allegiances of party leaders was as uncertain as that of their followers'<sup>177</sup>. In the wake of this liberal ascendancy tensions over the most propitious form of economic organization that society ought to adopt arose, and in particular how new streams of wealth generation both private and commercial ought to be governed, regulated and administered<sup>178</sup>. A major obstacle to these liberal aims was, as Bentham had argued, the prevailing civil justice system, which was perceived to be wholly inadequate to the task of improving economic conditions for the bourgeoisie

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<sup>176</sup> Lobban, 2004a, p.411

<sup>177</sup> Sir Llewellyn Woodward. 1962. *The Age of Reform 1815-1870*. Oxford: The Clarendon Press, pp.160-161

<sup>178</sup> This matter was dealt with at length in the House of Commons regarding the proposal to implement plans for social organization that has been championed by the social reformer Robert Owen. Defending the motion for wider implementation of what Robert Owen had achieved at his socialist utopia in New Lanark, Sir William Crespigny maintained that: 'At the period when Adam Smith wrote his treatise on the Wealth of Nations, the great object was to increase the wealth of the country. This object had been since achieved by the increase of machinery, so as almost to increase the production of some articles much beyond consumption. Now, Mr Owen's plan, to remedy this—to render the production of the necessities of life fully adequate to the increase of population—would effect a reorganization, and a re-memorizing of the lower classes, which there was no man of virtue who would not, he was persuaded, be most glad to see' (HC Deb 16 December 1819 Vol. 41 cc1189-217 at 1193 and 1194)

despite a number of attempts at reform between the 1820s and 1870s in which the appointed Commissions sought shorter, cheaper and more certain justice<sup>179</sup>.

Following in the wake of Adam Smith's *Wealth of Nations* the nineteenth century marked a definitive moment in the ascendancy of progressive economic thinking (what today is referred to as classical economics), which increasingly found fault and dysfunction in many of the social institutions of the State and, correspondingly, proffered remedies in the form of mass, largely liberal, reforms that relied on greater competition and markets. To establishment forces the rapid and influential growth of middle class industrialists and capitalist stakeholders signalled a threat, as this class, intent, as Marx argued, on 'having', especially with regard to property rights and ownership, grew in strength and authority<sup>180</sup>. Nouveau riche social climbers, parodied by the likes of the conservative Benjamin Disraeli in his 1828 novel *The Voyage of Captain Popanilla*, represented to those who clung to conservative notions and pseudo-feudal traditions a vulgar intrusion in society. And yet this bourgeois middle-class managed to accumulate increased levels of property and wealth in their various domains of enterprise, driven in part by the fear born of competition and markets, whereby 'one accumulates or one gets accumulated'<sup>181</sup>. Bourgeois stakeholders demanded more cost-effective and efficient civil justice that

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<sup>179</sup> Sorabji, 2014, p.13

<sup>180</sup> 'Private property has made us so stupid and one-sided', says Marx, 'that an object is only *ours* when we have it ... In the place of *all* physical and mental senses there has, therefore, come the sheer estrangement of *all* these senses, the sense of *having*'. (Karl Marx. 1975. Economic and Philosophic Manuscripts of 1844. *Collected Works, Volume 3, Marx and Engels 1843-1844*. London: Lawrence & Wishart, p.300)

<sup>181</sup> Heilbroner, 2000, p.156

would be capable of securing and making certain private property rights, therefore, freeing them to invest, to buy and sell, with greater confidence<sup>182</sup>.

The aggressive but increasingly creative *use* of capital by the bourgeois middle-classes via newly formed markets for commodities stood in stark contrast to the stagnant notions of settlements in perpetuity enjoyed by the likes of the aristocracy. Where feudal property interests had relied on inertia, capitalism demanded liquidity and a constant circulation of capital and commodities in markets, the new engines of progress that would, so it was (and still to large extent is) believed, provide a foundation upon which to build prosperity for all<sup>183</sup>. The shift from the predominance of land as a basis for capital accumulation and wealth that had begun in earnest during the Reformation, represented a shift from fossilized and un-useful status symbols that were incapable of sufficient liquidity and *equity*<sup>184</sup>. As a result, there was a rise in commodification and exploitation of forms of wealth, such as shares, as an outgrowth of incorporation in order to maximize capital gains<sup>185</sup>. '[T]he means of production and of exchange, on whose foundation the bourgeoisie built itself up', claimed Marx and Engels, 'were generated in feudal society'; but 'the feudal relations of property became no longer compatible with the already

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<sup>182</sup> In the context of the growing interest in and influence of Equity's domain over private and commercial trusts in the nineteenth-century, for example, Chantal Stebbings maintains that: 'Efficient trust administration and the recruitment of trustees required certainty in trusts law. Uncertainty led to litigation, expense and deterrence. The essential question facing trust lawyers of this new age was the extent to which the law would go to guarantee the safety of the trust fund, and whether potential trustees were willing or able to follow' (Chantal Stebbings. 2002. *The Private Trustee in Victorian England*. Cambridge: Cambridge University Press, p.16)

<sup>183</sup> Heilbroner, 2000, p.102

<sup>184</sup> In this context 'equity' is a reference to the value of various financial products such as shares, securities, bonds, and so on, although it also important to recognise the homology with the law of Equity as it is discussed here, not least because of, as I argue, the significance of economic reason on shaping Equity.

<sup>185</sup> Following the school of law and economics in their reading of the history of corporations as a product of the robust influence and flexibility of private civil law and justice, Geoffrey Hodgson remarks that law was treated 'as if it were akin to custom, with arrangements between parties as "private ordering", which could in principle emerge without the involvement of a state legal system'. But, there has been insufficient acknowledgement, Hodgson continues, 'of the role of the state in bringing corporations into existence and of how the development of company law stimulated entrepreneurial organizations that drove much of the explosive growth of capitalism in the last two hundred years' (2015, p.205)

developed productive forces; they hindered production rather than advancing it ... Into their place stepped free competition, accompanied by a social and political constitution adapted to it, and by the economical and political sway of the bourgeois class'<sup>186</sup>. Further, with the rising tide of liberal middle class socioeconomic and political power came a proliferation of voices and discourse intent on shaping the direction society. Reform during this period, as the Great Reform Acts are a testament to, was a major social and cultural project, as well as an economic, political, and legal one.

Positing capitalism as a self-destructive system greatly distanced Marx and Engels from many prominent commentators, socialist and non-socialist alike, before them, including those, such as the influential economist David Ricardo, who had supported the practicalities of Robert Owen's socialism, even though he did not support the theory behind it<sup>187</sup>. 'For Adam Smith, the capitalist escalator climbed upward, at least as far as the eye could see', maintains Heilbroner:

For Ricardo that upward motion was stalled by the pressure of mouths on insufficient crop land, which brought a stalemate to progress and a windfall to the fortunate landlord. For [John Stuart] Mill the vista was made more reassuring by his discovery that society could distribute its product as it saw fit, regardless of what "economic laws" seemed to dictate. But for Marx, even that saving possibility made it untenable. For the materialist view of history told him that the state was only the political ruling organ of

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<sup>186</sup> Karl Marx and Friedrich Engels. 1998. *The Communist Manifesto*. Edited by David McLellan. Oxford: Oxford World Classics, p.8

<sup>187</sup> In the 1819 Parliamentary debate concerning a motion to support Robert Owen's ideas, David Ricardo was recorded as stating that 'he was completely at war with the system of Mr Owen, which was built upon a theory inconsistent with the principles of political economy, and in his opinion was calculated to produce infinite mischief to the community'. Nevertheless, Ricardo went on to support the motion, adding to the small minority of sixteen members against a majority of one hundred and twenty five who voted not to support Owen. (HC Deb 16 December 1819 Vol. 41 cc1189-217)

the economic rulers. The thought that it might act as a referee, a third force balancing the claims of its conflicting members, would have seemed sheer wishful thinking. No, there was no escape from the inner logic, the dialectical development, of a system that would not only destroy itself but, in so doing, would give birth to its successor<sup>188</sup>.

In the dialectical tradition that ultimately sought to criticize it, capitalist class power forged new syntheses between politics and economics. Stakeholders invested financially but also psychologically in the new horizons of capitalism that were beginning to arise as the nineteenth century unfurled, were keen to cement their interests. And just as Frederick Hayek would claim during the middle of the twentieth-century, stakeholders were conscious of the importance of securing a favourable legal framework that would give structure and support to profitable enterprise and the growth of capitalism, as well as help disseminate capitalist ideology, thus bringing it into harmony with conceptions of justice through the concept of property rights and ownership<sup>189</sup>. The deliberate aim of stakeholders, as Marx's materialist view of history discussed by Heilbroner in the passage above maintains, was to ensure that law and civil justice were brought under the influence of economic reason *qua* capitalist ideology.

It was clear and perhaps no more so than in the accusations directed at the Court of Chancery, that civil justice in England and Wales was not in rude health when it came to the demands placed on it by stakeholders. In a telling commentary on civil justice in the mid-Victorian era, John Stuart Mill makes a deliberate point of distinguishing Equity as 'the best substantive law' from its problematic home in Chancery<sup>190</sup>. The reforms

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<sup>188</sup> Heilbroner, 2000, p.161

<sup>189</sup> See, for example: Hayek, 2013

<sup>190</sup> John Stuart Mill. 2008. *Principles of Political Economy and Chapters on Socialism*. Edited by Johnathan Riley. Oxford: Oxford University Press, p.261

mentioned by Mill were aimed at modernizing Chancery and by extension the civil justice system as a whole that appeared to be struggling under the sheer weight of the business it had to increasingly contend with. Michael Lobban argues that:

After 1830, debates over Chancery reform were dominated by disputes over detail, rather than disagreements on principle. If there was general political agreement on the need for law reform in general, there was much technical disagreement about what could be achieved and how. Debates were generally dominated by expert and professional opinion, and the reforms that were made were piecemeal and often lacked coherence. So it was with the Chancery: reform of the court was not ideology-driven and was not informed by principled goals such as Benthamite codification or substantive fusion. Reformers were more concerned with promoting efficiency by responding to practical problems identified in the working of the court. Reforms were experimental, building on the lessons of the Chancery commission and attempting to solve the problems of the litigant and the practitioner<sup>191</sup>.

To return briefly to the influence of Bentham as raised here and by Lobban: whilst it is the case that Bentham's name is not mentioned with regularity in the later years of the law and Chancery reform process according to Hansard, it is not true that Bentham was entirely vacant from the minds of reformers during the period of reform as a whole<sup>192</sup>. Further, Lobban's notion of Chancery reform not being ideologically-driven (in the mould of Bentham or otherwise), but instead focused on efficiency is, I suggest, to underplay the

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<sup>191</sup> Michael Lobban. 2004b. Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II. *Law and History Review*, Vol. 22, No. 3 (Fall), pp.565-566

<sup>192</sup> See for example: *Law Reforms* HC Deb 29 April 1830 Vol. 24 cc243-89 at 263 and 286

significance of efficiency as an ideological trope within capitalism. The day-to-day concerns of and problems faced by litigants and practitioners that reformers need to address may well have been to do with the finer details of Chancery operations, of what it did well, what it achieved, as well as what it failed to achieve. But litigants were especially concerned about what the court ought to achieve for them with regard to property rights, which is self-evident given litigants came to Chancery at all. They were not, in other words, gratuitously or abstractly interested in Chancery as an institution nor efficiency as an end in itself as implied by Lobban. Instead, Chancery provided access to, vindication within, and influence over the burgeoning liberal economic system. What the Judicature Commission appointed in 1867 set out to do therefore was effect fundamental change through a more efficient and cost-effective court structure that was ideological because it was inescapably embedded in the political economy of the capitalist age. If reforms were concerned with notions of justice as a universal good, the aim was, nevertheless, first and foremost cost and efficiency savings that would satisfy the demands of economic reason and, therefore, of capitalism.

#### 4. The age of Judicature

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The division of the systems of Equity and Common Law which it was now decided to abandon was peculiar to England and the colonies and states descended from her. The inconveniences it created, and the additional cost and risk, and the unnecessary delays it occasioned had steadily increased with the elaboration and development of the law, and the great improvements effected in procedure, which had attracted and admitted into the Courts an enormously increased mass of judicial business, had only made the evils incidental to the separation less easy to be borne<sup>193</sup>.

As the previous section has argued, Equity fetishism was symptomatic of a set of social conditions and in particular a bourgeois stakeholder mindset that was by the end of the nineteenth century accustomed to commercialism and economic reason as standards of

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<sup>193</sup> Kerly, 1889, pp.291-292

being in the world. 'The global triumph of capitalism is the major theme of history in the decades after 1848', claims Hobsbawm, it was 'a triumph of a society which believed that economic growth rested on competitive private enterprise'<sup>194</sup>. Frederick Engels describes these conditions further:

The struggle of capital against capital, of labour against labour, of land against land, drives production to a fever-pitch at which production turns all natural and rational relations upside-down. No capital can stand the competition of another if it is not brought to the highest pitch of activity. No piece of land can be profitably cultivated if it does not continuously increase its productivity. No worker can hold his own against competitors if he does not devote all his energy to labour. No one at all who enters into the struggle of competition can weather it without the utmost exertion of his energy, without renouncing every truly human purpose<sup>195</sup>.

I argue that stakeholders concerned with commercial certainties and guaranteeing economic futures constructed a fantasy of civil justice with complete justice at its core and applied it systematically, is was, for instance, the fantasy that lay behind what Kerly referred to as a 'cheaper' administration of civil justice<sup>196</sup>. A fantasy, however, that posits complete justice as stakeholder denial of the trauma of castration, the paradigm negativity that capitalist ideology blinds stakeholders to by demanding immersion in a 'logic of success' that maintains that the lost object is always (re)obtainable, and the symbolic (law) perfectible<sup>197</sup>. The result, as this chapter section will describe, was

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<sup>194</sup> Hobsbawm, 1997, p.13

<sup>195</sup> Fredrick Engels. 1975. *Outlines of a Critique of Political Economy*. In Karl Marx and Frederick Engels. *Collected Works, Volume 3 1843-1844*. London: Lawrence & Wishart, p.435

<sup>196</sup> Kerly, 1889, p.294

<sup>197</sup> Todd McGowan. 2016. *Capitalism and Desire: The Psychic Costs of Free Markets*. New York: Columbia University Press, p.36; Schroeder, 2004, p.241



Judicature and the creation of a 'unified code of procedure' that brought Common law and Equity together as a complete form of justice<sup>198</sup>. Echoing Robert Heilbroner, during the nineteenth century 'the time for the economists had arrived', and the civil justice system represented a target for rationalisation, which according to Max Weber was long overdue in comparison with the civil systems of Continental Europe<sup>199</sup>. To perfect justice using economic calculation meant the ultimate 'triumph over the threat of castration and protection against it'<sup>200</sup>. But what precisely constituted the Judicature reforms and how and why did the notion of ECJ emerge from them?

Conducted in the spirit of economic rationalisation, the 1873 Act is understood here as the legislative tail-end of a significant period of systemic legal reform which began with regard to the Court of Chancery under the sponsorship of the Parliamentarian M.A. Taylor during the early decades of the nineteenth century<sup>201</sup>. Judicature, it has been said, was prompted by the need to tidy up a legal 'field littered with the most venerable survivals from the Middle Ages', and this notion pointed not simply to laws that appeared ill-adapted to the needs of the modern economy, but the whole edifice of civil justice as well<sup>202</sup>. The Judicature process as a whole, a process that Parliament and legal reformers were pursuing earnestly and in larger numbers from the 1850s onwards, fitted the general economic strategies being adopted and applied to systems and institutions of State elsewhere at this time<sup>203</sup>.

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<sup>198</sup> Section 25(2) *Supreme Court of Judicature Act 1873*

<sup>199</sup> Heilbroner, 2000, p.41; Weber, 2002, p.27

<sup>200</sup> Freud, 2001, p.154

<sup>201</sup> See for example: *Appeals in the House of Lords—and suitors in Chancery*. HC Deb 07 March 1811 Vol. 19 cc260-9. [Online] Available at: <http://hansard.millbanksystems.com/> (accessed 24<sup>th</sup> January 2017)

<sup>202</sup> Sir Robert Ensor. 1936. *England 1870-1914*. Oxford: The Clarendon Press, p.17

<sup>203</sup> Woodward, 1962

Reflective of the court system as it existed pre-Judicature (King's/Queen's Bench; Chancery; Admiralty; Exchequer etc.), the need for reform was viewed as one of cost and efficiency savings due in large to the proliferation of court procedures and judicial styles and traditions<sup>204</sup>. The tone of reform was couched in terms of public interest, that is, the claim that society as a whole would benefit from a civil justice system that was more cost effective<sup>205</sup>. In truth, however, civil justice was the preserve of a privileged and wealthy few who owned the lion's share of the private property and were therefore focused on *their* rights as a priority over satisfying the demands of public interest. Michael Lobban claims that, for the most part, law reform did not excite the public imagination', by contrast, he continues, 'law reform did interest the mercantile and trading communities, who were especially concerned about developments in the law of debtor and creditor, bankruptcy and company law' and therefore it was often the case that the 'chamber of commerce and mercantile associations played a major role in promoting reforms in these areas'<sup>206</sup>. Reform was of significant interest to stakeholders who were intent on legal certainty to facilitate accumulation (the concentrating of wealth in order to further concentrate wealth) and thus grow a profitable economy, and, therefore, stakeholders fixed by the idea of growth. As Ursula Le Guin suggests: 'It seems that the utopian imagination is trapped, like capitalism and industrialism and the human population, in a one-way future consisting only of growth'<sup>207</sup>. And stakeholders lobbied heavily to ensure these ends, and this growth, could be achieved. Whether those same reforms ever

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<sup>204</sup> Holdsworth, 1929, p.27

<sup>205</sup> For example, the statement made in the Article XII of the Chancery Reform Association that, '[t]here is a determination on the part of a large portion of the public, and of their representatives in Parliament, to have cheaper law procedure'; quite what constituted a 'large portion' is, however, unknown (1850. The Chancery Reform Association. *Law Review, and Quarterly Journal of British and Foreign Jurisprudence* 13(1), p.194).

<sup>206</sup> Lobban, 2004b, p.567

<sup>207</sup> Ursula K. Le Guin. 1989. A Non-Euclidean Vision of California. *Dancing at the Edge of the World: Thoughts on Words, Women, Places*. New York: Grove Press, p.85

honestly targeted an all-inclusive social good in the public interest is, however, far less certain. Given limited albeit incrementally evolving and expanding suffrage, the 'public' referred to in the reform debates in Parliament would not have reflected society as a whole. Instead, much like capitalism today, it is a class of privileged property owning stakeholders with private interests to protect and exploit who are simultaneously the focus and focusers of political attention and thus those whose demands are registered. Not the bulk of an albeit less impoverished yet still relatively property- and power-less society for who debt rather than credit is the norm, and civil justice has limited *direct* influence<sup>208</sup>.

The perceived 'evils' in the civil justice system, therefore, reflected, I argue, the experience and individual interests of private and commercial stakeholders; it was a mirror held up to the proliferation of bourgeois ideology in nineteenth-century, but one that has not retreated. In keeping with the more contemporary capitalist notion of so-called 'trickle-down' economics that dominated economic policy development in Western capitalist societies in the aftermath of World War II, the reform agenda fitted notions of providing a rising tide of prosperity that would raise the fortunes of all members of society<sup>209</sup>. Judicature was necessarily a politico-economic issue for those in Parliament who were keen to show that Britain was a progressive and powerful industrial nation that respected and celebrated its past, but would not be hampered by a lack of

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<sup>208</sup> Wood, 2017, pp.2-3. For a further discussion on the relationship between domestic or household debt (as opposed to public or national debt) and wealth distribution see: Anthony B. Atkinson. 2015.

*Inequality: What can be done?* Cambridge: Harvard University Press, pp.165-166

<sup>209</sup> H. W. Arndt. 1983. The 'Trickle Down' Myth. *Economic Development & Cultural Change*. 32 (1), pp.1-10

progressive thinking in an age of new and expanding economic horizons<sup>210</sup>. Moreover, Judicature reflected the desires of capitalist class power and projected or displaced them onto the civil justice system making civil justice in large part synonymous with the economic reason it gave force to. To that end Judicature was a partial but far from insignificant element of the 'age of reform'<sup>211</sup>.

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<sup>210</sup> For some, notably members of the judiciary and lawyers more generally, Judicature represented a form of progress, but in the wrong direction. For example, Sir Roger Bowyer speaking in Parliament at the second reading of the Bill that would become the 1875 Act: How the Act of 1873 was passed through Parliament no one could tell. He did not sit in that Parliament and therefore was not responsible. At the time there was a Government which prided itself very much on what was called progress. They did not, he thought, draw a distinction between progress and change. They did not see that though progress was good when you were going in a good direction, it was bad when you were going in a bad direction; or that a man going over a precipice might reasonably be glad of what had been stigmatized as a retrograde movement. The Act of 1873 was brought in as a measure of progress. A great portion of the other side of the House thought it necessary to follow suit. He would venture to say there was scarcely a member of the legal profession of any position or experience who did not regret that the Act of 1873 was passed.

(*[Bill 162.] Second Reading.* HC Deb 10 June 1875 Vol. 224 cc1631-68.)

<sup>211</sup> Woodward, 1962

# Chapter 3

## *The Road to Complete Justice*

Before the law, we have justice without law; and after the law and during the evolution of law we still have it under the name of discretion, or natural justice, or equity and good conscience, as an anti-legal element. [Although] equity is a stage in the growth of law whereby it is expanded and liberalized after the period of fossilization, as it were, that inevitably follows primitive struggles toward certainty and definite statement, we must not forget that it is also a necessary reaction in certain periods of growth towards justice without law<sup>212</sup>.

### 1. Introduction

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On the eve of the first Judicature Act, the Attorney General, Lord Coleridge, in a tentative defence of the outgoing Court of Chancery, was reported as stating in Parliament that:

Without entering into a lengthened history of the subject, or a defence of the law of England as at present administered, or of the tribunals which administered that law, he might say, as one who had passed a large portion of his life in its study, that he had formed a strong opinion that, whatever might be the defects in the law, they were to be attributed, not to the learned Judges who administered it, but to the fact that the system on which it was founded, having grown up during the Middle Ages, was incapable of being adapted to the requirements of modern times. While saying, on the whole, that whatever might be its defects, it was founded on substantial justice and common sense, yet it was beyond controversy, that in many instances our procedure was impracticable and inconvenient, for no one practically conversant with its details could deny that there were certain great defects in them which ought to be remedied. First of all, there was the broad distinction which had become inveterate between what was

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<sup>212</sup> Pound, 1905, pp. 20-21

called in this country Law and Equity. In other countries, the distinction existed, and must always exist; but in this country alone, Law and Equity were made the subject of separate and even conflicting jurisdiction<sup>213</sup>.

What is most notable about Lord Coleridge's statement as part lament and part progressive edict, I suggest, is his reflection on the tension between past practices and allegiances and the needs and desires of 'modern times' stirred up by the period of reform, and due to the growing influence of capitalist stakeholders in Parliament. Coleridge is reflecting on a period which, as *per* Marx and Engels' incendiary indictment of the age, had seen the transformation of the modern State into little more than a 'committee for managing the common affairs of the whole bourgeoisie', which, by extension, points the idea of 'modern times' as euphemistic, and representative of liberal expansionism<sup>214</sup>.

The outgoing court system and Chancery, in particular, may have been 'founded on substantial justice and common sense', yet Coleridge's reference to the Middle Ages betrays a sense that the earlier practices and allegiances were primed to be swept aside by a burgeoning middle-class intent, at least in terms of civil justice, on enforcing liberal individualism through ownership and proprietary rights<sup>215</sup>. This emphasis on property ownership and rights, in turn, forged a new ethics and a particular form of stakeholder morality that derived its power and authority from the fetishization of economic idolatry. 'Once property had been officially deified', says Hay, 'it became the measure of all

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<sup>213</sup> HC Deb 09 June 1873, vol. 216, col. 640. [Online] Available at: <http://hansard.millbanksystems.com/> (accessed 26 January 2017) at 641-642

<sup>214</sup> Marx and Engels, 1998, p.5

<sup>215</sup> For a more comprehensive exploration of these ideas see for example: Edwin G. West. 2003. Property Rights in the History of Economic Thought: From Locke to J.S. Mill, in *Property Rights: Cooperation, Conflict, and Law*. Edited by Terry L. Anderson and Fred S. McChesney. Princeton: Princeton University Press, pp.20-42

things'<sup>216</sup>. The spirit of capitalism channelled through wealth and private property signalled the emergence of belief in a new God and puritanical belief, what Weber calls a 'specifically *middle-class ethic of the calling*', which the Church of England, as old religion, could not compete with<sup>217</sup>. 'In the consciousness of living in the full grace of God and being visibly blessed by him', Weber claims, 'the middle-classes businessman was able to pursue his commercial interests. Indeed, provided he conducted himself within the bounds of formal correctness, and as long as his moral conduct was beyond reproach and the use to which he put his wealth gave no offence, it was his *duty* to do so'<sup>218</sup>. Hence, the 'modern times' of which Coleridge spoke on the eve of Judicature were those informed by the growth of commerce, business and markets, all of which had resolved no use for the 'supernatural sanctions' of religion, yet mirrored religion as an eternal edifice built on faith, fealty, obligation and duty<sup>219</sup>. ECJ, if it were going to meet the demands of stakeholders and satisfy the 'moral' cause of which Weber speaks, thus needed to be recognisable as a secularized system of justice whose spiritualism and Godly inferences were no-longer those of Christendom but of capitalism.

It is worth noting that Coleridge did not so much predict as simply demonstrate a commitment to the new economic order emerging in the nineteenth-century<sup>220</sup>. 'A time always comes at which the moral principles originally adopted have been carried out in all their legitimate consequences', claims Sir Henry Maine, 'and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as

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<sup>216</sup> Douglas Hay. 1975. *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*. London: Pantheon, p.19

<sup>217</sup> Weber, 2002, p.118; see also: Heilbroner, 2000, p.35

<sup>218</sup> Weber, 2002, pp.118-119

<sup>219</sup> Tawney, 1990, p.192

<sup>220</sup> David Pugsley. 2004. 'Coleridge, John Duke, first Baron Coleridge (1820–1894)', *Oxford Dictionary of National Biography*, Oxford: Oxford University Press. [Online] Available at: <http://www.oxforddnb.com/view/article/5886> (accessed 12 June 2015)

the sternest code of rules avowedly legal'<sup>221</sup>. Maine identifies this moment in time quite precisely, at the start of the nineteenth-century and the Chancellorship of Lord Eldon, who dominated the Equity jurisdiction as Lord Chancellor for the better part of a quarter of a century. Eldon, Maine argues, was, 'the first of our equity judges who, instead of enlarging the jurisprudence of his court by indirect legislation, devoted himself through life to explaining and harmonising it'<sup>222</sup>. By way of contrast, Maitland sees Eldon as the tail-end of a process of systemization, the bulk of which was achieved under a series of Chancellors during the eighteenth century<sup>223</sup>. What is clear is that Lord Eldon, as Lord Chancellor from 1801-1806 and then again from 1807-1827 was in a prime position to shape Equity in accordance with the rising tide of economic efficacy<sup>224</sup>. For example, it was arguably his particular contribution to the formalisation of trusts jurisprudence that aligned Equity so well with the individualistic and *laissez-faire* instincts of stakeholders for wealth accumulation and built so effectively on the mentality of the previous century that had managed to erode the 'older moral economy as against the economy of the free market'<sup>225</sup>.

Yet the story begins even before this, with a noteworthy transformation in Equity practice beginning as early as the Tudor period, as we have seen, and most certainly under the Stuart monarchy via the high-powered proclamations of Lord Ellesmere in the *Earl of Oxford's Case* (1615) 1 Ch Rep 1. Although not comparable to the wholesale

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<sup>221</sup> Maine, 1972, p.40

<sup>222</sup> Maine, 1972, p.40

<sup>223</sup> F.W. Maitland. 1969. *Equity: A Course of Lectures*. Cambridge: Cambridge University Press, pp.10-11

<sup>224</sup> Lord Eldon's influence politically, as Lord Chancellor, in helping shape a politico-economic landscape favourable to the rise of bourgeois Capitalism extended beyond his work in Chancery. It has been argued, for example, that he was a notable opponent of the trade union movement, and that, had he been more diligent, would have opposed the repeal of the *Combination Act* 1799 following the Hume Report in 1824, an Act which prevented workman from forming unions and engaging in collective bargaining, the repeal of which formally legalized trade unionism (Francis Williams. 1954. *Magnificent Journey: The Rise of the Trade Unions*. London: Odhams Press, pp.46-47).

<sup>225</sup> Thompson, 2013, p.73



secularization that led the way to individualized belief under capitalism from the nineteenth century onwards, the earlier changes demand mention because they shift Equity towards a 'common set of progressive principles and practices based in natural law and rights', and away from 'Christian antinomianism and radical assertions of the free Christian conscience'<sup>226</sup>. As a consequence, by the time the taste for reform under the banner of capitalist economic reason took hold in the mid-nineteenth century, Equity's basis as a contemporary body of law in Canon Law had all but been denuded and its notion of conscience suitably transformed from an ecclesiastical to a civil one<sup>227</sup>. Paraphrasing the words of Marx and Engels, Equity's 'most heavenly ecstasies of religious fervour' had all but been drowned 'in the icy water of egotistical calculation'<sup>228</sup>. Equity was, therefore, primed and ready to serve an emerging economic moral order, and a bourgeois middle-class intent on having private property as well as perhaps, more importantly, using it to generate personal and commercial forms of wealth.

Even as a practical philosophy of complete justice was forming in the minds of reformers, therefore, it was against a backdrop in which Equity was practised in light of the notion that strict compliance 'was the servant of justice'<sup>229</sup>. '[A]s it matured', says Sorabji, 'equity adopted as strict an approach to rule-compliance as the common law. It did so not because such an approach was inevitable, as it was at common law due to the nature of the forms of action, but rather, because such an approach was understood to be the optimum means to ensure that the Chancery Court was able to achieve complete justice'<sup>230</sup>. Further, to ensure it was primed for the requirements of stakeholders in the

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<sup>226</sup> Fortier, 2015, p.6

<sup>227</sup> Sorabji, 2014, p.40

<sup>228</sup> Marx and Engels, 1998, p.5

<sup>229</sup> Sorabji, 2014, p.43

<sup>230</sup> Sorabji, 2014, p.43

private property order - that is, to make the day-to-day function of the private property order appear just and fair to and for stakeholders - civil justice needed to possess a degree of flexibility and judicial discretion. 'Equity's inquisitorial processes for taking accounts', argue Michael Bryan and Vicki Vann, 'were superior to the common law's accounting methods in adjusting rights and liabilities'<sup>231</sup>. Moreover, Equity signified the law's commitment to fairness and a superior wisdom that engendered 'a pure and flexible restraint on the lumbering beast of the common law'<sup>232</sup>. For Graham Virgo the matter is one of imagination and imaginativeness, and therefore whereas 'the Common law has a tendency to be rigid and unimaginative in its application, Equity is much more imaginative in its application and development', and Virgo points in particular to Equity's intervention in contract by way of rescission<sup>233</sup>. Chesterman, meanwhile, maintains that to consider Equity a sort of imaginary other 'is to engage in self-deception' because the earlier systemization of Equity had already made it resemble Common Law<sup>234</sup>. Somewhat contrary to Chesterman's conclusion, I argue that self-deception was precisely the point and that Equity fetishism demonstrates the significance of fantasy in shaping the type of civil justice stakeholders wanted, as well as the type of civil justice they wanted to project onto society as a whole.

Following a contemporary critique of Judicature and the so-called 'fusion' of Equity and the Common Law, Simon Chesterman argues that it is 'not only impossible but undesirable to provide a complete programme for future decisions', and instead points to the idea of displacing the ossification of doctrine by 'a new ethic of *responsibility to*

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<sup>231</sup> M.W. Bryan and V.J. Vann. 2012. *Equity & Trusts in Australia*. Cambridge: Cambridge University Press, p.19

<sup>232</sup> Simon Chesterman. 1997. Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law'. *Journal of Law and Society*. Vol. 24, No. 3 (Sep), p.355

<sup>233</sup> Virgo, 2012, pp.35-36; see also: *Cheese v Thomas* [1994] 1 WLR 129; *Mahoney v Purnell and others (Baldwin and another, third parties)* [1996] 3 All ER 61

<sup>234</sup> Chesterman, 1997, p.355

*justice*'<sup>235</sup>. The logic of Equity fetishism maintains however that this is not what happened following the Judicature reforms, and, indeed, the very fact that Chesterman is critiquing fusion is because he reaches a not dissimilar conclusion. Instead the ossification of ECJ centred on the doctrine of unconscionability as a means of flexibility, agility and responsiveness that could be applied across the civil justice system allowing 'equity to temper the harsh application of the common law and the countervailing need for certainty in the adjudication of legal rights', but equally to sustain a fantasy of an economic and moral world-order based, at least in the mind of the stakeholder, on complete justice<sup>236</sup>. 'Seen through the eyes of one whom the enactment of the Judicature Acts is part of history', claims J.A. Jolowicz, 'the most important of the ideas contained in the phrase 'complete justice' is the creation of a single jurisdiction for the administration of both law and equity so that, in a single set of proceedings, *the remedies of both should be available and the need for the parties to have recourse to more than one court should be eliminated, thereby achieving considerable savings of both time and expense*' [emphasis added]<sup>237</sup>.

## 2. A problem called Chancery

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Of all parts of the English legal system, the Court of Chancery, which has the best substantive law, has been incomparably the worst as to delay, vexation, and expense; and this is the only tribunal for most of the classes of cases which are in their nature the most complicated, such as a cases of partnership, and the great range and variety of cases which come under the denomination of trust. The recent reforms in this Court have abated the mischief, but are still far from having removed it<sup>238</sup>.

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<sup>235</sup> Chesterman, 1997, p.364

<sup>236</sup> Chesterman, 1997, p.354.

Graham Virgo maintains that: 'Although doctrine and principle is vital to the modern law of Equity, the very existence of arguably the most important equitable principle might serve to undermine the doctrinal coherence of the subject. This principle is that of unconscionability' (2012, p.29)

<sup>237</sup> Jolowicz, 1983, p.298

<sup>238</sup> Mill, 2008, p.261

By the time of the Judicature Commission in 1867, it was made clear that in order for progress to be made in civil justice reform the continuing necessity of the Court of Chancery needed questioning. It is important to note that what is here summarized as 'a problem called Chancery' brought together a number of concerns for reformers and stakeholders alike, some of which were very longstanding indeed. Chancery, after all, was not merely a Court. It was a pillar of civil justice and the exclusive domain of Equity. Furthermore, Chancery embodied a heady mix of rules, principles and ideas that were a direct consequence of Equity's roots in Canon Law and the Christian intellectual tradition, thus informing, at least in part, the popularity of Equity jurisprudence<sup>239</sup>.

Chancery reform began in the first half of the nineteenth century predicated on the need for speed, efficiency and cost-effectiveness, three things the Court was said to lack. The reason for reform along these lines was attributed in large part to the failings, not the successes as Sir Henry Maine suggests, of Lord Eldon's Chancellorship<sup>240</sup>. D.M. Kerly, for example, maintained that: 'The last years of Lord Eldon's Chancellorship were marked by the commencement of a persistent and determined attack upon the abuses which had grown up in Chancery, or, inherent in its practice from the first, had developed until they could no longer be tolerated'<sup>241</sup>. But while some may have believed Eldon could make the process of reform cleaner and more straightforward, the reality was that the flaws in the court were far more complex. As the Judicature Commission later in the century would eventually concede, these perceived flaws were not something that could be remedied at

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<sup>239</sup> Sorabji points to 'the means by which litigants could obtain documentary evidence from their opponents', what is otherwise called 'discovery', as a prime example of the legacy of Canon Law on the shape of Equity and how it was practiced in Chancery in particular (Sorabji, 2014, p.41).

<sup>240</sup> Maine clearly disagreed with criticisms of Eldon's Chancellorship, which he implies continued to taint his achievements during Maine's own time of writing in the mid-nineteenth century: 'If the philosophy of legal history were better understood in England, Lord Eldon's services would be less exaggerated on the one hand and better appreciated on the other than they appear to be among contemporary lawyers' (Maine, 1972, p.40).

<sup>241</sup> Kerly, 1889, p.264

a granular level nor did the various matters of principle 'generate a coherent reform strategy', but instead what was required was wholesale change at the very level of civil justice itself<sup>242</sup>. For example, Michael Lobban maintains that 'the years up to 1873 saw frequent discussion over whether the various functions of the Lord Chancellor should be separated out, though the matter remained unresolved. Equally', Lobban continues, 'there was periodic discussion of whether there were enough judges to handle the court's caseload, or whether new ones should be appointed'<sup>243</sup>.

Notwithstanding a lack of personnel during the eighteenth and early nineteenth centuries, Chancery's problems in processing the increased levels of business it faced were arguably a product of growing commercial interest and the demands of capitalism as much as, if not more than, issues that were internal to the civil justice system as such. Chancery Equity provided stakeholders with the means, for example, to define and enforce commercial partnerships and 'a central forum for both property disputes and property management', which reflected, as Chantal Stebbings maintains, the emergence 'of the new professional and commercial middle class' that was 'confident, articulate and independent' and the 'new wealth of the country'<sup>244</sup>. Commercial litigants continued to rely on Equity in growing numbers even when Chancery, condemned as flawed by various nineteenth-century reform associations, was creaking under the weight of a conspicuous case-load. As such there was a notable contradiction between the popularity of the Court of Chancery and the laws it administered. The virtues of Equity were enthusiastically extolled, especially with regard to property and trusts jurisprudence, but, equally, the evils of Chancery, litigant vexation at the court's arcane structures and procedures that

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<sup>242</sup> Lobban, 2004a, p.390

<sup>243</sup> Lobban, 2004a, p.390

<sup>244</sup> Lobban, 2004a, 391; Stebbings, 2002, p.13

led to long delays and high costs, and arguably corruption on the part of the court masters, lingered and provided the rationale and motivation to bring an end to the bifurcated civil justice system<sup>245</sup>.

Justice, whilst desirable in principle, was nevertheless expected to function as support for economic reason, rather than the other way around. Sorabji argues that, under equity, 'truth could not but be loved too well or obtained at too high a price'<sup>246</sup>. That, at least, was the determination of a prevailing cohort of Chancery judges, Equity lawyers, and those narrow segments of society with wealth enough to sustain prolonged and often obtuse litigation. If complete justice was to carry a price following Judicature it was going to have to be one that was acceptable to broader sections of society, namely bourgeois stakeholders. That is not to say voices from within the edifices of Equity or Common Law were silent on the matter. Chancery's survival post-Judicature as a Division of the newly formed High Court system and homology of the lost Court was a decision made prior to the passing of the Judicature legislation and championed by the legal profession. As Lobban maintains: 'On the basis of the recommendations of the commission, Lord Chancellor Hatherley introduced a bill in March 1870. It sought to create a single High Court of Justice with separate divisions but left the details of the distribution of business between the divisions and of procedure to be determined by rules made by a majority of the judges'<sup>247</sup>. The fears of the legal professionals trained exclusively in the ways and means of Equity (the Chancery bar and judges), although, I argue, a secondary influence in the Judicature process behind stakeholders was nevertheless made apparent in the reform agenda.

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<sup>245</sup> Lobban, 2004a, p.391 and p.395

<sup>246</sup> Sorabji, 2014, p.42

<sup>247</sup> Lobban, 2004b, p.594

Given the desire for Equity but increasing attacks on Chancery, an inevitable question was how Equity's future without its Court would unfold<sup>248</sup>. What would it mean to deprive Equity of its independent basis in law and dilute the special knowledge held by members of the Chancery bar as well as its judges? 'Chancery reformers', states Lobban, 'responded to the common law changes, and vice versa, generating a mutual movement towards fusion', and this dialogue was instrumental in distinguishing Equity as much as it was in ensuring it would be subsumed into a monolithic legal discourse<sup>249</sup>. With fusion becoming an increasing reality Equity judges and lawyers pressed the case for the preservation of 'their special knowledge' in order to 'prevent it being eroded by greater powers being granted to the common law'<sup>250</sup>. There was resistance to the reform agenda, therefore, especially from members of the Chancery bar but equally from other members of the legal community, precisely because the unification of the courts and corresponding notion of complete justice being pursued was seen as contentious if not impossible given, for example, the potential for conflict between the rules of doctrines of Equity and those of the Common Law.

Viewed through the lens of psychoanalysis the resistance by members of the legal community to the stakeholder drive for complete justice revealed a neurotic attachment to certain laws and forms of procedure that continues in doctrinal approaches to law and legal reason that regard it as essential to modern society 'that the law be closely and cogently reasoned', not least because access to courts 'is hugely expensive'<sup>251</sup>. Evidence

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<sup>248</sup> In elaboration of his notion of Equity as a gloss, Maitland talks of the important jurisdictional and procedural bond Equity had with regard to trusts. A bond that was broken by Judicature, and yet Equity's continuation, and, more importantly, the continuation of trusts demonstrate, as Maitland suggests, that the bond was merely historical and diminished year on year following Judicature. In other words, for Maitland and a number of other legal and economic stakeholders, Equity did not need Chancery. Chancery was dead, long live Equity. (Maitland, 1969, p.20)

<sup>249</sup> Lobban, 2004b, p.587

<sup>250</sup> Lobban, 2004b, p.593

<sup>251</sup> Watts, 2014, pp.107-144

from the legal community's discourse concerning *inter alia* ECJ reveals individual and at times a broader community tendency towards the neurotic defence of the existing legal edifice, crystallized in the office of Chancellor for instance, and the self-justification of Chancery's rules, doctrines and principles<sup>252</sup>. This in stark contrast to the perverse belief of stakeholders of the importance of complete justice as an ally of economic reason, and thus the inevitable elision of law and economics. The neuroses of the legal community described here is arguably symptomatic of legal expertise and reasoning founded on a fantasy of law's inherent logic, that is, law *without, above, or beyond* the (traumatic) reality of capitalist influence bearing down upon it and its institutions<sup>253</sup>. We will explore these ideas in more depth in later chapters.

For commercial interests demanding certainty from the law and improvements in civil justice, the Court of Chancery appeared to represent all that was rotten in the prevailing system. John Smith made plain in a Parliamentary debate in 1825 on delays in Chancery that, Chancery was perceived to be so bad that businessmen used to threaten one another with filing a bill as leverage in disagreements over commercial transactions<sup>254</sup>. The growing bourgeois middle class, as the new stakeholders of capitalism hungry for improvements in both social and fiscal status, found themselves increasingly influential in shaping the nature of institutions able to benefit them. No longer, for example, was

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<sup>252</sup> As Michael Lobban maintains: 'For Chancery men, who felt under siege, given the numerical predominance of common law judges, the Chancellor's position was vital to ensure the ultimate supremacy of the principles of equity' (Lobban, 2004a, p.426). '[T]he equity judges scarcely wanted to promote a code that would bring about substantive fusion', Lobban further argues, rather theirs 'was an essentially defensive positions: to protect their knowledge and prevent its being eroded by greater powers being granted to the common law' (Lobban, 2004b, p.593).

<sup>253</sup> 'Neurotics are dominated by the opposition between reality and phantasy', argues Freud, if 'what they long for the most intensely in their phantasies is presented to them in reality, they none the less flee from it; and they abandon themselves to their phantasies the most readily where they need no longer fear to see them realized' (Sigmund Freud. 2001a. *A Case of Hysteria, Three Essays on Sexuality and Other Works: The Standard Edition Volume VII (1901-1905)*. Translated and Edited by James Strachey. London: Vintage, p.110)

<sup>254</sup> *Delays in the Court Of Chancery*. HC Deb 31 May 1825 Vol 13 cc960-1008 at 982. [Online] Available at: <http://hansard.millbanksystems.com/> (accessed 20<sup>th</sup> June 2017)



Chancery Equity the sole preserve of the aristocracy or feudal lords who, by and large, had been able to afford to suffer the inefficiencies and 'diseases of the Court' of Chancery - inefficiencies that would eradicate the fortunes of less well-off middle-classes<sup>255</sup>. On the one hand, Equity, its procedural mechanisms, jurisprudence and forms of reasoning, suited and satisfied the needs of stakeholders who were intent on *having* and *using* property and capital as a way of indulging their self- and commercial interests. As Maitland so vociferously proclaimed: 'Of all the exploits of Equity, the largest and the most important is the invention and development of the Trust. This is perhaps the most distinctive achievement of English lawyers. It seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law'<sup>256</sup>. On the other hand, the Court of Chancery, with its many layers of administration and bureaucracy, and its arcane systems of practice and pleading, elicited quite the opposite reaction.

Chancery had many critics. Beginning with M.A. Taylor as reported in the 1820s: '... as it existed at present, this Chancery jurisdiction was perfectly detested throughout the country; and, in an age like this, such cumbrous forms of proceeding could not much longer be endured'; to Lord Hatherley, Lord Chancellor at the first reading of the doomed High Court of Justice Bill (the immediate precursor to Judicature) in 1870, who was reported as saying: '... it had long been the opinion that we had suffered grievously in our whole system of judicature—nay, in our whole system of jurisprudence—from the unhappy separation of our Courts into two distinct branches, administering law on totally distinct principles'<sup>257</sup>. The pressing question for reformers time and again, therefore, was what to do about the dysfunction in and persistent failures of Chancery. '[T]he growing

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<sup>255</sup> Kerly, 1889, p.154

<sup>256</sup> Maitland, 1969, p.23

<sup>257</sup> *Delays in The Court Of Chancery*. HC Deb 31 May 1825, Vol. 13, cc960-1008 at 995; *Presented. First Reading*. HL Deb 18 February 1870, Vol. 199, cc504-27 at 506

wealth of the country and its increasing trade', claims Kerly, 'brought forcibly home to every man of business the need for Courts where rights could be plainly declared and speedily secured'<sup>258</sup>. He continues:

During the last century the great estates of the country had at irregular intervals struggled slowly through Chancery, and their proprietors had come to regard the delays and expenses of the process as inevitable, if unpleasant incidents of ownership, but the merchant and middle classes were less patient, and, moreover, the Court was even less fitted for the decision of disputes in which they were likely to be interested than for the administration of estates<sup>259</sup>.

When reformers spoke of the 'evils', 'melancholy evidence of the mischief and misery inflicted upon society by the Court of Chancery', and of the 'Poverty, pauperism, madness, suicide...produced by the torturing delays, the inquisitorial proceedings, and the ruinous costs of a suit in Chancery', these were not problems faced by a privileged few that were of primary concern<sup>260</sup>. Although, as I argued earlier, neither was it a problem faced by the public at large for whom the type of justice under debate, indexed to private property and transactions of personal and commercial wealth, was a distant reality. It was the burgeoning bourgeois class that Chancery was seen to be failing, or, rather, was maladjusted to serve. So unpopular had Chancery become by the middle of the century among those who relied on it for adjudication that an article on Chancery reform talked

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<sup>258</sup> Kerly, 1889, p.265

<sup>259</sup> Kerly, 1889, p.265

<sup>260</sup> 1850. The Chancery Reform Association. *Law Review, and Quarterly Journal of British and Foreign Jurisprudence*, Vol. 13, Issue 1 (November), pp. 193-208

of a procession of advertising vans roaming London and denouncing the Court of Chancery as the British Inquisition<sup>261</sup>.

With a settled aim of reconfiguring civil justice in order to better suit commercial and business interests Chancery reformists drew on the experience of other Common Law jurisdictions. In particular, reformists looked for new thinking able to cut through the thick background of custom and tradition that at once held the British social order together, but, more importantly, was increasingly perceived as an encumbrance. The systemic reform of the New York justice system and its civil procedure code during the first half of the nineteenth century proved particularly influential in this regard. This was especially so given its source in a newly independent America which was directing much of its energy toward meeting successful commercial ends and promoting markets as an ultimate way to organize and manage society. Alexis de Tocqueville noted that, America was a country where ‘individual entrepreneurship was the dominant norm’, and these were precisely the conditions favoured by the upwardly mobile stakeholders of the middle classes in Britain who were busy lobbying for civil justice reform throughout the nineteenth century<sup>262</sup>.

‘The key political impetus for fusion came from America’, states Lobban, ‘LAS [Law Amendment Society] members had followed with great interest the process of reforming New York's civil procedure after 1847. At the end of 1850, the society invited David Dudley Field to address them on these reforms and, having met the great reformer, set up a committee chaired by Robert Lowe to consider whether law and equity could be fused in England’<sup>263</sup>. The Field Code of Civil Procedure established the basis for civil

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<sup>261</sup> The Chancery Reform Association, p.193

<sup>262</sup> Sheldon S. Wolin. 2001. *Tocqueville between Two Worlds: The Making of a Political and Theoretical Life*. Princeton: Princeton University Press, p.347

<sup>263</sup> Lobban, 2004b, p.584

procedure across America and clearly linked the worlds of law, business and finance. The Code deliberately accounted and thus made space for the imposition and growth of capitalist ideology through the administration of civil justice, rather than treating economic and commercial interests as an afterthought to legal abstractions as the basis for defining justice.

‘The common law courts have from time immemorial administered equity law. The only embarrassment that has attended it, has arisen from the imperfect machinery of the courts of law’, declaimed the authors of the New York Civil Code in light of the shortcomings in its sister State Pennsylvania<sup>264</sup>. ‘If they had enlarged their forms, as our code has enlarged them’, it continues, ‘their system would have been excellent’<sup>265</sup>. What the New York experience demonstrated to reformers in Britain was that it was possible for Equity or Common law to administer the rules and doctrines of the other as justice (attuned to economic reason) required. Uncertainty, derived from the inconvenience and expenditure of having to shuttle between different courts in the hope of a final judgment, it was hoped would, therefore, be mitigated by the unification of the courts. The ambition of Judicature was thus posited as a need to manage a crisis in civil justice out of existence<sup>266</sup>. But, again, the socioeconomic scope of this ambition is questionable because, first and foremost, it aimed at benefitting stakeholders rather than the public at large. Any residual impact from the reforms that might benefit the public was, I argue, of secondary concern.

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<sup>264</sup> New York (State). Commissioners on Practice and Pleadings. 1850. *The Code of civil procedure of the state of New-York*. Albany: Weed, Parsons & co., public printers. [Online] Available at: <https://archive.org/details/codecivilproced00fielgoog> (accessed 27 January 2017) p.268

<sup>265</sup> New York (State). Commissioners on Practice and Pleadings, 1850, p.268

<sup>266</sup> At a practical level it was a very particular interpretation of justice that the reformers had in mind. One that was, first and foremost, founded on rights in succession, inheritance, acquisition by contract and warrantable conveyances.

The important message for stakeholders from American civil justice reform remained the benefits of and therefore the need to align law more closely with economics. 'Field's democratic politics [...] intersected with New York's commercial culture at the heart of his procedural reform', argues Kellen Funk, '[t]he 'plain speaking' valued by Jacksonian Democrats had become the language of the marketplace and was now made the language of the law'<sup>267</sup>. A highly motivated belief in capitalism and the economic rationales of competition and efficiency it promoted already existed in England by the time of Field's visit, not least by virtue of Bentham's influence. Unlike America, however, it did not reveal itself quite so readily on the surface of all social life in England in the ways de Tocqueville had described in the 'New World'. Given the liberal political context, however, the rationale for the fusion of Equity and the Common Law and the decision regarding the primacy of complete justice was indelibly marked by the ideals of capitalism, and a constant and progressive tension was maintained in the Common Law to ensure it was brought into harmony with society on these terms<sup>268</sup>. A separate Court of Chancery was not required, therefore, and indeed would simply complicate the matter

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<sup>267</sup> Kellen Funk. 2015. Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-76. *Journal of Legal History*, 36, no. 2. [Online] Available at: <http://ssrn.com/abstract=2600201> (accessed 20<sup>th</sup> August 2016)

The Jackson legacy on the intersection between American legal and commercial consciousness is noteworthy and somewhat disturbing, especially if its effects ended straddling the Atlantic and taking root in the reform discourse in Britain. Disturbing because, as Howard Zinn has argued, Jackson was a ruthless progressive who cleared from his path any obstacle to further capital. Zinn maintains that: 'Jackson was a land speculator, merchant, slave trader, and the most aggressive enemy of the Indians in early American history' (Howard Zinn. 1996. *A People's History of the United States from 1492 to the Present*. 2<sup>nd</sup> Edition. London: Longman, p.125

<sup>268</sup> Noted earlier, Michael Lobban disagrees with this view, and especially the influence of Bentham: 'reform of the court was not ideology-driven and was not informed by principled goals such as Benthamite codification or substantive fusion', claims Lobban, instead reformers 'were more concerned with promoting efficiency by responding to practical problems identified in the working of the court' (2004b, p.566). However, I maintain that Lobban errs in this analysis because it implies efficiency is non-ideological, when, as the following Chapter will discuss in detail, efficiency is integral as a practical response to the socio-economic and political problems capitalism identifies and attempts to solve, and therefore a core part of the capitalist ideology.

of a smooth fusion of the laws and more efficient and, above all, cost-effective system of civil justice.

The decision of reformers to follow the experience of American civil justice reform is, I argue, a key moment in the construction of the fantasy of complete justice *qua* Equity fetishism. The message from New York was that Equity could not be easily excluded from the machinery of justice. This sentiment was clearly reflected in Parliament in the lead-up to Judicature where Equity was referred to by the Attorney General at the time, Sir John Coleridge, as possessing a 'superior breadth and wisdom' compared to the Common Law<sup>269</sup>. The role that Equity was to play in achieving the desired completeness of justice was therefore seen as vital.

### 3. Equity as a means to complete justice

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The wager this thesis makes is that within capitalism, stakeholder desire to avoid the traumatic reality of castration encourages complete justice as a juridical mode, institution, and ideal of certainty and coherence that is seen as capable of making the capitalist economy work more efficiently and effectively. In return for this expenditure of desire, capitalism provides the stakeholder with pleasure through guarantees of self-interest and satisfaction in the pursuit of private property, but, more importantly, a means of denying and disavowing the traumatic reality of limitation *qua* castration. Later we shall explore in more depth the role fantasy plays in the bargain between stakeholder and capitalism, and in particular the role of Equity fetishism in mediating desire and satisfaction within capitalism.

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<sup>269</sup> *Second Reading*. HC Deb 09 June 1873 Vol. 216 cc640-86. [Online] Available at: <http://hansard.millbanksystems.com/> (accessed 27 January 2017) at 645

Moreover, the extent to which the failure of complete justice to be *complete* is crucial to the psychic life of the law, to legal practitioners, and stakeholders because it maintains unmet demand as desire. But this constant striving for perfection of justice also makes the law neurotic. For example, we find Lord Romilly in the Parliamentary debates regarding a High Court of Justice Bill in 1870s – an immediate precursor to Judicature – lamenting but not denying the possibility of complete justice: ‘You will never get a perfect union of Law and Equity unless you make a code of laws which will, to a considerable extent, alter the character of the laws that now exist. You are now making a prodigious alteration in English law, with which many persons will be shocked. The fusion of Law and Equity will require great care and time - it is a matter not to be done speedily, it cannot be done by altering the procedure merely, and I hope some delay will be given that the subject may be duly and more fully considered’<sup>270</sup>. Moreover, the Lord Chancellor, Lord Selborne, speaking immediately prior to the passing of the first Judicature Bill in 1873 stating that, ‘This Bill had been carefully framed [...] in order to clear the platform, to unite jurisdictions, to bring together the Courts, to abolish all technical and legal impediments to the perfect and complete action of the Courts upon every matter within their cognizance, but so to do this that the immediate transition should be made without violence, without danger to the rights of persons or property, or to the interests of the public at large’<sup>271</sup>.

Complete justice has been introduced both as a thematic in the influential ideas and reform agenda of Jeremy Bentham, and developed in the context of the ‘fusion’ of

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<sup>270</sup> *High Court of Justice Bill—(No. 72.) —Appellate Jurisdiction Bill*. HL Deb 29 April 1870, Vol. 200, cc2034-57 at 2039

<sup>271</sup> *Second Reading*. HL Deb 11 March 1873, Vol. 214, cc1714-39 at 1732

Common Law and Equity following the nineteenth century Judicature Acts<sup>272</sup>. Further, Spencer Walpole discussing the Judicature Bill, 30 June 1873, was reported as stating that: 'Let the House consider what the fusion of Law and Equity meant. It was a system of jurisprudence under which any Court should administer complete justice from the beginning to the end of a suit or cause'<sup>273</sup>. Complete justice, as we have seen, was a phrase that appeared in parliamentary debates in the lead-up to Judicature in 1873, as did analogue notions of and claims to 'unification' and 'perfection' that, whilst stated as part of an agenda for 'practical' and 'public interest' reform nonetheless engender the fetishistic prerequisite that I claim explains complete justice within the private life of self-interested stakeholders.

Complete justice had long been associated with a combination of activities between the separate jurisdictions of Common Law and Equity, and represented a desirable outcome of the two, in effect, working together. Complete justice can be viewed as predating the Judicature reforms and having a long association with Equity as a body of laws as well as an idea of justice<sup>274</sup>. The association with Equity is especially pertinent when distinguishing the former methods and practices of Equity in the Court of Chancery from those of the Common Law courts, with the latter representing a formalist mode of rule compliance that ECJ supplemented with more discretionary approaches to adjudication following the Judicature reforms. Walpole's statement echoes the earlier definition of complete justice made by Sir John Mitford (Lord Redesdale) at the end of the eighteenth century, which appears throughout his *Treatise on the Pleadings in Suits in the Court of*

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<sup>272</sup> 'Fusion' is highlighted as such because it is viewed by some commentators as a problematic term in this regard. See for example: R.P. Meagher, W.M.C. Gummow, J.R.F. Leane. 1992. *Equity Doctrines & Remedies*. 3rd edition. Sydney: Butterworths

<sup>273</sup> *Committee*. HC Deb 30 June 1873, Vol. 216, cc1561-605 at 1599

<sup>274</sup> Sorabji, 2014



*Chancery by English Bill*, a text that would define understandings of Equity adjudication during the nineteenth century in both Britain and America:

It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented<sup>275</sup>.

Key to understanding its significance is the recognition that complete justice is not limited in definition to Equity but is a product of the relationship and the tensions between Equity and Common Law adjudication. Since Judicature notions of complete justice have informed a civil justice system comprised of Equity *and* Common Law as concurrent jurisdictions, and it is more accurate to describe Equity as *a* means to complete justice, therefore, rather than *the* means to complete justice. Following the reforms in the nineteenth century, complete justice was cemented in mainstream legal discourse through the implementation of the rules governing the new Supreme Court system (the Rules of the Supreme Court, or 'RSC'). The effect of ECJ has led to 'the development of procedural devices distinct from those at common law; a strong commitment to rectifying

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<sup>275</sup> John Mitford. 1876. *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*. New York: Baker, Voorhis & Co. Publishers. [Online] Available at: [http://www.mindserpent.com/American\\_History/reference/equity/1876\\_mitford\\_by\\_jeremy\\_equity\\_pleading.pdf](http://www.mindserpent.com/American_History/reference/equity/1876_mitford_by_jeremy_equity_pleading.pdf) (accessed 3 September 2017), p.256

errors in decision-making’ – notably via a more robust appellate jurisdiction – ‘and a strict approach to rule-compliance married to a liberal approach to relief from adverse consequences for non-compliance’<sup>276</sup>.

But what of the influence of capitalist ideology on civil justice and how the influence of unconscious desires and fantasies promulgated by capitalism both through the property concept and the civil justice system designed to administer it might contribute to ‘an image of ordinary plenitude that the subject has lost’<sup>277</sup>? As a product of capitalist fantasy complete justice fits squarely within the definitional role of fantasy articulated by psychoanalysis because it enables the subject’s traumatic experience of lack [a product of castration] to be converted into ‘a more acceptable experience of loss in order to produce the illusion that there is somewhere a satisfying object of desire’<sup>278</sup>. In addition to conventional accounts of civil justice that view its role purely in terms of facilitating knowledge and performance of and claims to the rights that civil law gives us, the assertion here is that ECJ has, as Aristodemou states with regard to legal discourse more generally, an ‘*other side*’ supported by ideologies, fantasies and unconscious desires<sup>279</sup>.

Notwithstanding the balancing-act played by the legislative determination of concurrency in bringing Equity and the Common Law together, complete justice is a direct reflection both of a ‘triumph of equity over the common law’ and a justice system that was, following the Judicature reforms in the nineteenth century, recast ‘in equity’s image’<sup>280</sup>. Equity’s relationship with and contribution to the contemporary civil justice

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<sup>276</sup> Sorabji, 2014, p.41

<sup>277</sup> McGowan, 2013, p.199

<sup>278</sup> McGowan, 2013, p.199

<sup>279</sup> Aristodemou, 2014, p.3

<sup>280</sup> Sorabji, 2014, pp.56-57

system since the nineteenth century is, if not exactly unique, both fundamental and defined in large part by what it means to complete justice.

Complete justice is not a niche or marginal concern for critical analyses of civil justice. It is vital to considerations of the nature of law and justice within the prevailing socio-economic system, namely capitalism. And, importantly, for considerations of how subjects exist within that system from the point of view of the effects that civil justice engenders. If the civil justice system has an incontrovertible role and place in contemporary socioeconomic life as the means of organizing knowledge of and claims to the rights that the civil law gives us, then the importance of the reasoning that fuels that system, namely ECJ, is clear<sup>281</sup>. The following description of the civil justice system is instructive in this regard:

The civil justice system exists in order to enable individuals, businesses, and local and central government to vindicate and, where necessary, enforce their civil legal rights and obligations, whether those rights are private or public. It exists to ensure that the mere assertions of the civil law are 'translated into binding determinations'. Equally, it provides the basis for individuals to resolve disputes concerning their civil legal rights and obligations consensually through any of various informal and formal means of alternative dispute resolution procedure, as well as, the means to enforce consensual resolution. In this way, the system provides a secure framework through which social and economic activity takes place, property rights, civil rights and liberties are secured and government is

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<sup>281</sup> For a general commentary on the importance of civil justice in informing subjects of their rights and facilitating claims, as well as the centrality of civil justice to creating a certain basis of the promotion and growth of business and commerce (what is here critically considered along the lines of the influence of economic reason in law), see: Tom Bingham. 2011. *The Rule of Law*. London: Penguin, pp.38-39

rendered subject to the due process of law. In delivering justice in this manner, the civil justice system provides a public good by giving life to the rule of law<sup>282</sup>.

Sorabji's account of complete justice reveals a number of aspects or fragments that I claim are central to its appeal. Alongside property as a major aspect constituting the bases for complete justice is the vindication of property rights, namely, the application of prescribed personal or proprietary remedies that enable a claimant to secure a proprietary interest. Graham Virgo explains that once 'a claimant has established that he or she has a legal or equitable proprietary interest which can be followed [in law] or traced [in equity] into the property which has been received by the defendant, the claimant can establish a restitutionary claim to vindicate his or her proprietary rights'<sup>283</sup>. In the case of Equity this can include constructive trusts that enable a full transfer of the property to the claimant by way of trusts in which the defendant holds the property as trustee for the claimant as beneficiary, or a proportionate share by way of the same mechanism<sup>284</sup>.

As we have seen, Equity was and is a vital component of the civil justice system both procedurally and jurisprudentially. This is notable in the administration of property, including the creation and vindication of proprietary and personal rights, and especially the influence that the doctrine of unconscionability, which will be discussed in later

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<sup>282</sup> Sorabji, 2014, p.10

<sup>283</sup> Virgo, 2015, p.631

<sup>284</sup> Virgo, 2015, pp.632-633

chapters, has had on shaping the rights regime within the ambit of civil justice<sup>285</sup>. ‘Equity’, as Dennis Klinck maintains in his survey of Equity and the notion of complete justice in the Ontario Court of Chancery, ‘not only restrains the common law where its strict application might be unjust, but *it makes whole or perfect the justice of the common law*’ [my emphasis]<sup>286</sup>. John Sorabji meanwhile notes that ‘complete justice’ was the terminology favoured in the nineteenth century, whilst ‘substantive justice’ became the favoured terminology during the twentieth century. But, he continues: ‘[d]espite these terminological differences, the idea they expressed was the same: justice was achieved when an individual claim or dispute concluded with a court judgment that was ‘substantively accurate’<sup>287</sup>. As a result, ECJ is ultimately defined as a marriage of formal rule-compliance with ‘a liberal approach to procedural amendment or the grant of relief from the adverse consequences of procedural error’<sup>288</sup>. Or what is otherwise construed as a degree of *flexibility* that Equity brings to the administration of civil justice<sup>289</sup>.

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<sup>285</sup> ‘The use of unconscionability as a rationale for intervention’, as Nicholas Hopkins has remarked, ‘has enjoyed an apparent revival not only in English law but throughout the common law world’ (Nicholas Hopkins. 2007. How Should We Respond to Unconscionability? Unpacking the Relationship between Conscience and the Constructive Trust, in *Contemporary Perspectives on Property, Equity and Trusts Law*. Edited by Martin Dixon and Gerwyn LL H Griffiths. Oxford: Oxford University Press, p.3). Mark Pawlowski talks of the expansion of unconscionability via proprietary estoppel signalling a ‘considerable flexibility’ in the court’s reasoning, which has been highlighted in a number of cases including: *Jennings v Rice* [2002] EWCA Civ 159 (CA), *Campbell v Griffin* [2001] W & TLR 981 (CA), *Ottey v Grundy* [2003] EWCA Civ 1176 (CA), *Uglow v Uglow* [2004] Civ 987 (CA), and *Murphy v Burrows* [2004] EWHC 1900 (Mark Pawlowski. 2001. Unconscionability as a Unifying Concept in Equity. *The Denning Law Journal*. Vol. 16, p.79

<sup>286</sup> Dennis R. Klinck. 2006. Doing “Complete Justice”: Equity in the Ontario Court of Chancery. *Queens Law Journal*, Vol. 32, Issue. 1, p. 48

<sup>287</sup> Sorabji, 2014, p.2

<sup>288</sup> Sorabji, 2014, p.68

<sup>289</sup> The notion and problematic of Equity’s flexibility, and in particular with regard to doctrines such as estoppel and unconscionability, is a potent and consistent theme throughout case-law and orthodoxy, see for example: Millett, 1998, p.214 – ‘Resistance to the intrusion of equity into the business world is justified by concern for the certainty and security of commercial transactions [...] This is often repeated like a mantra. But it is inaccurate and its influence has been harmful’; Sarah Worthington. 2006. *Equity*. 2nd Edition. Oxford: Oxford University Press; Lord Walker in *Cobbe v Yeoman’s Row Management Ltd and another* [2008] 1 WLR 1752 at 46 – ‘equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way’. Lord Neuberger. 2009. The Stuffing of Minerva’s Owl – Taxonomy and Taxidermy in Equity. *Cambridge Law Journal*, Vol. 68, No. 3 (November), p.541 – ‘it is

A key issue surrounding ECJ as fetish is that it takes the place not of some actual or perfect form of justice that is waiting to be discovered by the subject, but masks the traumatic reality that there is no justice at all or as such. In instilling the civil justice system with ECJ in the aftermath of the Judicature reforms the stated aims of reformers were improvements in efficiency in terms of time, by reducing delays in court business, but more importantly in terms of cost. The aim of the RSC was to cement this economic reasoning and ensure it became standard practice to adhere to efficiencies in all civil justice proceedings<sup>290</sup>. This, so it was believed, would lead to 'complete justice' between parties as has since been proclaimed in all manner of cases, including *Prestney v Corporation of Colchester* (No 2) (1883) 24 Ch D 376 at 380; *In re Sussex Brick Company* [1904] 1 Ch 598 at 609; *Cloutte v Storey* [1911] 1 Ch 18 at 35; and *In Re Colgate (A Bankrupt), Ex parte Trustee of the Property of the Bankrupt* [1986] Ch 439 at 44.

As a fetish ECJ at once fills and disguises a *lack* of complete justice predicated in large part on the Aristotelian legacy of ideas concerning Equity's role regarding general theories of justice<sup>291</sup>. Much like Sorabji's definitions, Aristotelian inspired narratives always remain vague as to precisely how Equity *completes* justice. Any insistence that Equity is a means to complete justice that the general law cannot complete - Maitland's 'gloss' on the law is another version of this – whilst instructive as to the areas of law in which Equity ought to

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simply not for the courts to go galumphing in, wielding some Denningesque sword of justice, to rescue a miscalculating, improvident or optimistic property developer from the commercially unattractive, or even ruthless, actions of a property owner, which are lawful at common law').

Whether Equity is *more* flexible than Common Law is, however, open to debate; see, for example: Douglas Laycock. 1993. The Triumph of Equity. *Law and Contemporary Problems*, Vol. 56, No. 3 (summer), p.71 - 'The most general distinction between law and equity in the early days was in the attitudes of the two systems toward formalism and discretion. Law was formal and rigid; equity was flexible, discretionary - a court of conscience [...] I suspect that this historical stereotype is exaggerated, because we also say that the genius of the common law was in its flexible stability and its capacity for growth within a tradition'; and Hudson, 2017.

<sup>290</sup> See: Supreme Court of Judicature. Rules of the Supreme Court. 1883. [Online] Available at: <http://parlipapers.proquest.com.libezproxy.open.ac.uk/parlipapers/docview/t70.d75.1883-059672?accountid=14697> (accessed 22 June 2017)

<sup>291</sup> Aristotle, 2009, p.99

be deployed, tells us very little about what is actually achieved or at stake in the completion or perfection of the law<sup>292</sup>. What these accounts have in common with this thesis, however, is an acknowledgement of a lack, most often in the form of a gap in justice; the same gap that, at least in mainstream thought, explains the logical basis for a corresponding law or set of laws (namely Equity) required to fill the gap.

J Walter Jones offers just such an account: '[T]he unwritten law, in its aspect of what equity or fairness requires in the case ... can be accorded an element of generality in that the attitude of approach represented by it towards special problems expresses *a fundamental human striving to fill the gap* which constantly opens between enacted law and the call of justice' [my emphasis]<sup>293</sup>. Jones' account is interesting because it appears to go further than most commentators by asking questions of sociology (if not exactly psychology). For Jones, the gap that requires filling is not necessarily institutional, systematic or even philosophical in nature, but human. What Jones does not acknowledge is the gap that the desiring subject strives to fill is in and of itself. The gap never exists in Equity or civil justice in the first instance, but in the subject who conceives of those laws and justice. This point cannot be stressed enough because it goes to the heart of the present thesis and the theories of Equity and civil justice that will be developed during the course of the analysis, and as they relate to castration.

The distinct and pronounced features of Equity's completion of civil justice is particularly notable in the Australian Common Law tradition, and specifically the state of New South Wales (NSW) where Equity remained separate (un-fused) from Common Law until 1972 following enactment of the *Supreme Court Act 1970* (NSW), some one hundred years after

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<sup>292</sup> Maitland, 1969, p.18

<sup>293</sup> J Walter Jones. 1956. *The Law and Legal Theory of the Greeks*. Oxford: Clarendon Press, p.67, quoted in Watt, 2012, p.9

England and Wales. Whilst the jurisdiction of Australia is not the main focus for this thesis, as a jurisdiction within the broader Western Common law capitalist tradition, the fact NSW kept a separate court of Equity long after comparable jurisdictions had fused their own civil justice systems raises questions of whether the experience of Equity and the reasoning that flows from NSW reveals any more detail as to the nature of civil justice unification and thus desire to perfect the system than comparable jurisdictions by virtue of the recent, living memory of the separate court. The answer, it would appear, is mixed. On the one hand, there was merely a failure to attempt fusion in NSW for one hundred years following Judicature in England and Wales and rest of Australia due to 'legislative inertia'<sup>294</sup>; on the other, the 'influential opposition to postpone the enactment of the judicature legislation for the best part of a century' played a role, and was rooted in judicial resources that 'permitted equity specialisation, and the specialisation in turn reflected the volume of commercial and property litigation in Sydney which ensured a heavy workload for the equity judge'<sup>295</sup>. Equity in NSW, therefore, survived as a discrete body of law because of demand by commercial stakeholders.

The longer and more specialised training for Equity lawyers in NSW clearly reaped its rewards, however, in the recognition of Meagher, Gummow and Lehane, three prominent Australian lawyers from NSW, as amongst, Birks claims, 'the greatest masters of equity in the modern world'<sup>296</sup>. The three provide incisive analyses of the interventions of Equity into the business of Common law, which is to be expected given the prominence of commercial cases in NSW, and especially where the Common Law is perceived as falling

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<sup>294</sup> Bryan and Vann, 2012, p.12

<sup>295</sup> Bryan and Vann, 2012, p.12

<sup>296</sup> Peter Birks. 1996. Equity in the Modern Law: An Exercise in Taxonomy. *Western Australian Law Review*, Vol. 26, No.1, (July), p.3



short in rendering justice complete by either lacking or not recognizing certain key aspects of the requirements of justice:

The equitable jurisdiction, of enormous importance, comprised [...] (ii) the enforcement of contracts on principles unknown to the common law – for example, sometimes recognizing contracts not under seal, long before the simple contract was accorded recognition at law; (iii) interference with the rigidity of the law in cases where the presence of fraud, forgery or duress would render the enforcement of strict legal rights unconscionable; (iv) the giving of remedies unavailable at law, for example, injunction or specific performance; (v) the development in the equitable action of account of a much more flexible and beneficial instrument than its common law counterpart; and (vi) the giving of common law remedies where they theoretically existed at law, but in practice were not available – owing, for example, to local rebellion, bias and “the violence” (as it was put in many petitions) of the defendant<sup>297</sup>.

In this passage Meagher *et al* bring into play many discrete aspects of Equity, but they are equally those of importance to complete justice, for example, the emphasis on flexibility and unconscionability. As discussed previously here, unconscionability and the flexibility it delivers relative to the strict application of Common Law rules or insistence upon rights is key to Equity’s contribution to civil justice. In his analysis of the development of ECJ in the civil justice system, John Sorabji shows how these conscientious roots of Equity as an

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<sup>297</sup> Meagher *et al*, 1992, p.5

alternative to the formal rule-compliance of the Common Law have directly informed the notion of complete justice:

[U]nlike at common law, procedural compliance was not a factor that equity had to consider when assessing the substantive merits of a case [...] That difference stemmed from its development out of a form of canon law procedure, which required the Chancery Court to act as a Court of Conscience and thereby secure the reformation of sin through correcting a litigant's corrupt conscience. To achieve this is placed a positive duty on the court not to act unconscionably. While equity over the course of time would transform an ecclesiastical concept of conscience into a civil one, it maintained its commitment to ensuring that it would, in the words of Lord Nottingham LC, 'never ... confirm an award against conscience' [...] It did so through ensuring that it would pursue, as Lord Talbot LC described it in *Knight v Knight*, 'complete justice'<sup>298</sup>.

The evolution of unconscionability has long been indexed to the evolution of commercialism and the nature of *transaction* as necessarily securing favourable grounds for fair bargaining and economic dealing. Lord Hardwicke in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 maintained that, 'fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has always been the appearance of fraud from the nature of the bargain'<sup>299</sup>. Lord Denning MR further developed the theme of inequality in bargaining in *Lloyd's Bank Ltd v Bundy* [1975] QB

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<sup>298</sup> Sorabji, 2014, pp.39-40

<sup>299</sup> (1751) 2 Ves Sen 125 at 157

326 stating that ‘without independent advice, [the claimant] enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reasons of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other’<sup>300</sup>.

The Privy Council decision in *Hart v O'Connor* [1985] AC 1000 brought to bear a particular focus on the morality of transactions, in a case that involved issues of disability. The morality question turned upon the transaction as unconscionable given one party's exploitation of the weakness of the other. Pure commerciality has also given rise to the possibility of the application of unconscionability as Browne-Wilkinson J demonstrated in *Multiservice Bookbinding Ltd v Marden* [1979] 1 WLR 243. Within the logic of commercialism and private property within capitalism the contemporary cases listed above are entirely justifiable. Within economic reason, there is a morality that governs the nature of the transaction, and fair bargaining practices, especially with regard to contractual obligations that play a vital role in maintaining the structure of contemporary economic practices and conduct, but it is morality defined not by the inner life, estimations of fairness, nor conscientiousness of humans, but by economic calculation. We will return to the matter of contemporary applications of unconscionability in Chapters 5 and 8.

Following the theme of unconscionability briefly, however, I argue that as a facet of complete justice unconscionability ultimately functions as a field of representation that aims to fill a gap not simply in cases involving civil justice – as Jones or Meagher *et al* believe - but in subjects who both conceive of and seek complete justice. The source of

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<sup>300</sup> [1975] QB 326 at 339

this 'gap' is, not precisely as Walter Jones claims, but as Freud tells us, castration. But while castration 'is the nothing that generates the subject, and the encounter with it traumatizes the subject' this does not mean that all confrontations and encounters with this paradigmatic form of negativity are universal<sup>301</sup>. Fetishism, as later chapters will outline in more detail, is a perverse form that the subject's encounter with castration assumes. Although fetishism, like other forms of subjective deflection of traumatic experience, is far from a guarantee that the subject will be able to avoid the traumatic realisation of castration. 'The fetish merely appears to substitute something that could potentially or actually exist', argues Samo Tomšič, '[i]ts main function is to reject castration from the symbolic, but this move always backfires and the fetish turns from a prosthetic organ into a monument of castration'<sup>302</sup>. On this account, ECJ assumes a very different form: a 'monument' to a *lack* of justice. One, for example, laid bare through extensive vindication of the many fallacies that supposedly constitute complete justice, namely, the stakeholder belief that complete justice is the clearest example of what is flexible, fair and liberal.

## 4. Conclusion

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The nineteenth century 'was a period of great developments for the equitable jurisdiction'<sup>303</sup>. 'The enormous industrial, international and imperial expansion of Britain in this period', says Jill Martin, 'necessitated developments in equity to deal with a host of new problems. The accumulation of business fortunes required rules for the administration of companies and partnerships; and the change in emphasis from landed wealth to stocks and shares necessitated the development of new concepts of property

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<sup>301</sup> McGowan, 2013, p.113

<sup>302</sup> Samo Tomšič. 2015. *The Capitalist Unconscious: Marx and Lacan*. London: Verso, p.178

<sup>303</sup> Martin, 2012, p.15

settlements'<sup>304</sup>. Whilst a settling of the body of laws had been undertaken before the start of the century, Lord Eldon ensured in the opening decades of the nineteenth century that the process of Equity's systemization was both brought up to the standards of the Common Law and ultimately reconfigured to meet the demands of capitalism, all features that would be crucial in determining the nature of ECJ by the close of the century.

Between the establishment of the Judicature Commission in 1867 and enactment of the first piece of Judicature legislation in 1873, the case for unification and perfection of the civil justice system *qua* complete justice was made-out. With Chancery gone it only remained necessary to translate ECJ into the civil justice system as a whole. This was the role for the Rules of the Supreme Court (RSC) in the aftermath of Judicature. 'From the 1820s to 1873 there was a decisive shift away from the common law's formalist approach to securing substantive justice towards equity's complete justice approach', explains Sorabji, 'a shift', he concludes, 'that was finalised by the introduction of the RSC post-1873'<sup>305</sup>. Jolowicz echoes the significance that resulted from Judicature on the nature of justice. 'Probably the most significant achievement of the Judicature Acts, and the most fundamental aspect of 'complete justice' was the ultimate separation of substantive law from procedure', argues Jolowicz, 'this alone made possible the belief, now almost universally accepted as self-evident, that legal rights and obligations are one thing, the machinery and procedures for their recognition and enforcement another'<sup>306</sup>.

Equity procedure and jurisprudence were central to the type of civil justice that commercial and private stakeholders alike demanded and showed a just and unyielding devotion to. This helped secure the victory of Equity over the Common law with regard

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<sup>304</sup> Martin, 2012, p.15

<sup>305</sup> Sorabji, 2014, p.48

<sup>306</sup> Jolowicz, 1983, p.300

to complete justice and made ECJ a standard of civil justice underlying huge expansion in private property ownership and wealth for at least a few stakeholders during the twentieth century. Equity fetishism ties the fantasy of capitalism, the (il)logic and belief that it is possible to locate one's ultimate desire, to a legal means of investing in and engaging with that fantasy. Equity and ECJ allowed stakeholders access to and control over private property rights, it vindicated their belief as it vindicated their rights, and furnished stakeholder existence with a sense of inevitability that the lost object was (and is) always near and castration a lie. Complete justice *qua* Equity fetishism fixed the gaze of the stakeholder and lured them with the promise of something special, something they would not give up.

# Chapter 4

## *Equity, Private Property & the Stakeholders of Capitalism*

### 1. Introduction

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The following chapter plays a vital role as it focuses on many substantive and doctrinal elements that will later be theorised in relation to Equity fetishism. As the title of the chapter shows, the substantive areas in question concern the relationship between Equity, civil justice, private property and stakeholders, including their use of and reliance on trusts, contractual remedies and the law of fiduciaries as juridical mechanisms for managing and conducting economic activity within capitalism. 'I think that we can safely say', argued Holdsworth in the first half of the twentieth century, 'that, without the evolution of a system of equity, English law could not have been made adequate to meet the social and economic needs of the modern state'<sup>307</sup>. To determine what is stake from Holdsworth claiming of adequacy, this chapter will examine the role of Equity in the balance of power between law and economics within capitalism.

Whilst Equity provides rules and procedures in conjunction with Common Law that informs the structures and frameworks of civil justice through which commercial activity is conducted, and in that sense facilitates economic activity in the form of personal and commercial asset management, exchange and transaction, law does not as a general rule, I argue, dominate economics within capitalism. Instead law, its variegated jurisprudences, procedures and processes, judges, lawyers, academics, and so on, are beholden to economic reason, and this manifests in a variety of ways. By, for example,

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<sup>307</sup> Holdsworth, 1925, p.202

moulding regulations to be market-complementing, or, as Yip and Lee euphemistically maintain, in the resultant 'primacy of commercialist pragmatism' within the field of Equity jurisprudence and competence<sup>308</sup>. The focus here is on the property concept and private property in particular as a legally legitimate and mandated site that economics, namely capitalism and neoliberal capitalism, *uses* to reproduce itself ideologically and materially. Equity derives a great deal of authority and legitimacy as a body of private laws from the property concept, and in conjunction with the property regime constructed by the Common Law at large. As Peter Birks maintains: 'There are legal property rights and equitable property rights, and there are legal obligations and equitable obligations. There is not really anything else'<sup>309</sup>. Further, Bryan and Vann describe some of the key aspects of Equity's peculiar contribution, including:

The creation of special rules governing the assignment of property interest.

An assignment is the immediate transfer of an interest in property.

Property, for this purpose, includes intangible property, such as a chose in action, for example, the right to enforce a contract. Common law and statute prescribe formalities for the transfer of most forms of property.

Equity enables property to be assigned where the method of assignment does not comply with these rules. It also enables 'future property', meaning property to which the transferor does not at present have title, to be assigned<sup>310</sup>.

Equity is relevant within capitalism I argue precisely because it offers these sorts of mechanism for stakeholders in conjunction with and as an extension of the Common Law,

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<sup>308</sup> Yip and Lee, 2017, p.657

<sup>309</sup> Birks, 1996, p.19

<sup>310</sup> Bryan and Vann, 2012, p.17



to manipulate and manage private property, extract value, and ultimately generate usable wealth. In the form of trusts this manipulation is even more acute, as Jonathan Garton explains with regard to the purposes a stakeholder may have for establishing a trust: 'These purposes include concealing ownership, facilitating land conveyancing and other types of dealing in property, holding and controlling property for the sake of large groups of people (particularly in the fields of collective investment and charitable and other non-profit orientated activity), providing for the founder's family in various ways over long periods of time (both before and after his or her death), protecting property from creditors and from the extravagance of individual members of the family, and cutting down tax liabilities, particularly on the transfer of private capital'<sup>311</sup>.

Following Garton, we can also note Sarah Worthington's view of Equity's 'manipulation of traditionally accepted concepts of property', and the fact that 'Equity would sometimes regard certain assets as property even when the Common Law did not'<sup>312</sup>. As a species of private law, Equity, as Peter Birks explains, 'concerns the persons who bear rights, the rights which they bear, and the actions by which they protect those rights'<sup>313</sup>. Further, Graham Virgo claims that Equity is 'even more imaginative in its recognition of property rights' than Common Law, because 'Equity is able to recognize rights to assets and the use of property, but also the value of property and rights that may arise in the future'<sup>314</sup>. Stakeholders, therefore, have a rich tapestry of ways in Equity with which to, for example, establish and manage private property interests, rights in assets such as debts, and so-called securities, allowing them to be traded as forms of usable wealth. Via these sorts of

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<sup>311</sup> Jonathan Garton. 2015. *Moffat's Trusts Law, Text and Materials*. 6<sup>th</sup> Edition. Cambridge: Cambridge University Press, p.12

<sup>312</sup> Worthington, 2006, p.51

<sup>313</sup> Birks, 1996, p.8

<sup>314</sup> Virgo, 2012, p.18

mechanisms and interactions stakeholders do not simply conduct business, manage assets or undertake transactions as neutral, banal or common sense practices. Rather they create and exploit ('leverage' to use the parlance of modern business), what Virgo refers to as, 'particular events' that create equitable property rights<sup>315</sup>. 'Equitable proprietary rights need to be created specifically', argues Virgo, with 'a variety of events that will operate to create equitable interests in property', and he lists what he views as the major examples of these:

By far the most significant is the express create of that interest, as occurs where an express trust is created. Secondly, this may arise by virtue of a presumed intent that property should be held by the legal owner on behalf of the claimant [e.g. resulting trusts]. Thirdly, the equitable proprietary interest may arise by operation of law, often because the defendant can be considered to have acted unconscionably<sup>316</sup>.

Virgo also describes the role of Equity's creation of *personal* rights as 'of real significance to the development of the law', notably that of fiduciaries, which we will examine in more depth later<sup>317</sup>.

'It is all very well to identify a body of judge-made law, give it a name, identify certain vague characteristics, and then seek to justify this by reference to constitutional, political and legal developments many hundreds of years ago', argues Virgo, concluding that the 'crucial question is whether Equity remains relevant today'<sup>318</sup>. This thesis agrees with Virgo on the need to ascertain the relevance of Equity today, moreover that Equity 'clearly

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<sup>315</sup> Virgo, 2012, p.18; see also: Birks, 1996; Watts, 2014,

<sup>316</sup> Virgo, 2012, p.19

<sup>317</sup> Virgo, 2012, p.21

<sup>318</sup> Virgo, 2012, p.8

is' still relevant 'in terms of explaining long-established doctrines of private law and also as a mechanism for providing new solutions to contemporary problems'<sup>319</sup>. What can be added to these evaluations of Equity is, however, an analysis of its contribution to stakeholder adherence to the ideological principles of capitalism by providing new solutions to contemporary problems, as Virgo would have it. Equity fetishism, as a psychoanalytical interpretation of the role and function of law, construes Equity as a means of reinforcing and reproducing capitalist ideology through its defence of the fairness of transactions and the flexibility required to perform them within, for instance, commercial contexts involving the law of contract<sup>320</sup>. In doing so, Equity does not represent a universal ideal of fairness or transcendent morality but one that functions and has relevance to stakeholders within the closed circuits of capitalism, what Mark Fortier refers to as 'the moral narrowing of equity in the development of its imperatives'<sup>321</sup>. And yet the social and political pervasiveness of capitalism and especially in its neoliberal form means the narrow deontological imperatives of Equity have arguably become normative standards in the wider field of subjective existence. 'Every legal relation is a relation between subjects', argues Evgeny Pashukanis, the 'subject is the atom of legal theory, its simplest, irreducible element'<sup>322</sup>. Therefore, before looking at private property in more detail it is necessary to examine the particular interpretation of economic subjectivity Pashukanis describes and one that underscores this thesis, namely *the stakeholder*.

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<sup>319</sup> Virgo, 2012, p.8

<sup>320</sup> 'Equity is sometimes willing to assess whether a transaction is fair and, if it is not, may set aside the transaction aside', states Virgo and this includes examining 'the procedural fairness of the transaction, as regards the process by which the contract was made' (Virgo, 2012, p.9).

<sup>321</sup> Fortier, 2005, p.186

<sup>322</sup> Evgeny B. Pashukanis. 1989. *Law & Marxism: A General Theory Towards a Critique of the Fundamental Juridical Concepts*. Translated by Barbara Einhorn. Edited by Chris Arthur. London: Pluto Press, p.109

## 2. The Stakeholder

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The stakeholder is an economic subject defined by a certain primacy they give to private property interests. Marx called these subjects 'the adherents of the monetary and mercantile system, who look upon private property *only as an objective* substance confronting men'<sup>323</sup>. In the Introduction to this thesis, the stakeholder was described as one who willingly answers the call or 'hail' of capitalism<sup>324</sup>. We can now expand on this initial outline. The stakeholder is one who engages in competition and the 'free-market' logic of property distribution, regulation and efficiency, where the latter denotes 'allocation of resources in which value is maximised'<sup>325</sup>. Further, the stakeholder seeks to accumulate, exploit and seize opportunities for economic advantage and gain, even where that might or does involve calling foul, unfair or unequal the bargaining practices and conduct of other stakeholders. On this basis, the stakeholder defined here corresponds with what Karl Polanyi called 'atomistic and individualistic' organic forms, and Louis Althusser referred to as 'interpellated subjects'<sup>326</sup>. While the stakeholder is historically contingent and socially varied, they are always already beholden to the authority and hegemony of economic reason, what Antonio Gramsci calls 'economism'<sup>327</sup>.

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<sup>323</sup> Karl Marx. 1975. Third Manuscript: Private Property and Labour. Political Economy as a Product of the Movement of private Property, in, Karl Marx and Frederick Engels. *Collected Works, Volume 3 1843-1844*. London: Lawrence & Wishart, p.290. Given the parity of dates, Marx's view of mercantilism can usefully be compared to Michael Lobban's reference to the significant influence on and 'major role' of 'the mercantile and trading community' in law reform during the nineteenth century (Lobban, 2004b, p.567)

<sup>324</sup> Althusser, 2008

<sup>325</sup> Richard A. Posner. 1986. *Economic Analysis of Law*. 3<sup>rd</sup> Edition. Boston: Little, Brown and Company, p.12

<sup>326</sup> Polanyi, 2001, p.171; Althusser, 2008

<sup>327</sup> Antonio Gramsci. 1971. *Selections from the Prison Notebook*. Edited and Translated by Quintin Hoare and Geoffrey Nowell Smith. London: Lawrence & Wishart, pp.158-168. Gramsci differs from Althusser in his reading of the role of ideology in society and its ultimate impact on the subject, and whilst this, not the place to discuss the comparative merits of Gramsci and Althusser's ideas, it is import to note them. See for example: Stuart Hall. 2016. *Cultural Studies 1983: A Theoretical History*. Edited by Jennifer Daryl Slack and Lawrence Grossberg. Durham: Duke University Press

The stakeholder is not simply defined by passivity in the face of the inevitability of economic reason brought about by capital's domination of all or many aspects of contemporary social life, but by a complex of economic, legal and psychological referents. As the name suggests, the stakeholder is committed to a certain mode of being in the world centred on capitalist logic, reason and ideology, as well as belief in fantasies promulgated by capitalism. The stakeholder does, I claim, *enjoy* capitalism, and thus by the logic of that form of social organization is one who adheres, perhaps slavishly so, to the ways, means and ideology of capitalism through the pursuit of private property and self-interest. The fundamental fantasy of the stakeholder is, therefore 'that of an individual existence that owes nothing to the larger social structure in which it resides', making the stakeholder a private, perverse, and narcissistic figure who seeks meaning and understanding of the self in the materialism of private property and the opportunism it affords them<sup>328</sup>.

In contrast to the notion of the 'subject' used at points during this thesis thus far to describe a broader psychosocial form of subjectivity, the stakeholder is a particular form of economic subjectivity defined by the private property order under capitalism, and use of civil justice to access and navigate that order. On the one hand, the stakeholder reflects a category of subjects whose property and financial interests are construed by the Ministry of Justice as substantial. This includes stakeholders deemed sufficiently 'important, complex or substantial' to warrant being dealt with by the High Court rather than the county courts<sup>329</sup>. The definition of stakeholder used during this thesis is not

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<sup>328</sup> McGowan, 2013, p.204

<sup>329</sup> Ministry of Justice. 2016. *Civil Justice Statistics Quarterly, England and Wales (Incorporating The Royal Courts of Justice 2015)*. [Online] Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/527018/civil-justice-statistics-january-march-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527018/civil-justice-statistics-january-march-2016.pdf) (accessed 1 June 2017), p.3

always theoretical or general, therefore, but reflects an economic subject for whom complete justice between the parties in civil cases is a viable proposition *only* because they have the economic means and socio-political significance to trigger mechanisms of complete justice within the civil justice system. Stakeholders with *privilege* thus engender the fetishistic prerequisite of Equity and ECJ through an encounter with civil justice because they can, broadly-speaking, afford it.

These stakeholders might be asset-rich, maybe even high net worth individuals or corporations, and enjoy a strong position in terms of property rights as a result. In questioning the nature of the privilege enjoyed by stakeholders, however, psychoanalysis points not to satisfied or fulfilled subjects, but the inverse. Capitalist ideology instead 'aims at producing subjects who experience their existence as dissatisfied and simultaneously invest themselves completely in the ideal of happiness or complete satisfaction'<sup>330</sup>. The completeness of the 'investment' sought by stakeholders manifests itself *inter alia* in material and abstract financial investments (forms of which will be discussed in more detail later in this chapter), but, importantly, also via a visceral engagement with capitalist ideology itself as the hoped-for means through which to actualise a complete, non-castrated self. Investment thus encompasses the banality of bureaucracy and the perversity and ecstasy of risk and competition, allowing stakeholders to seek what they desire and find enjoyment in bureaucratic systems of justice and property.

On the other hand, the theory of Equity fetishism extrapolates to the wider 'theoretical' population of as yet under- or unprivileged bourgeoisie stakeholders that exist within what Lorenzo Chiesa and Alberto Toscano call the 'ideological force-field of

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<sup>330</sup> McGowan, 2013, p.60

contemporary capitalism'<sup>331</sup>. In other words, this population of bourgeois stakeholders *want* to be the privileged adherents of a juridical demarcation of substantial claims and of transactions defined by the Ministry of Justice, and in many respects Equity and the flexibility it brings to Common law and civil justice is there to help achieve that goal. As Mark Pawlowski maintains, with particular regard to the flexibility Equity exercises through the doctrine of unconscionability:

Although the jurisdiction to set aside unconscionable bargains was originally confined to reversioners and expectant heirs, it has since been extended to poor and ignorant persons and where the transaction in question was made at a considerable undervalue without the benefit of independent legal advice. More recently, it has been held that the modern equivalent of “poor and ignorant” is “a member of the lower income group . . . less highly educated.” This broadening of the class of claimant eligible for relief has increased considerably the potential availability of the doctrine to a wider range of transactions where the terms are unconscionable and the victim does not receive independent legal advice. The essential elements of the doctrine were set out by Mr Peter Millett QC (sitting as a deputy judge of the High Court) in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*:

“First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken . . . Second, this weakness of the one party has been exploited by the other in some

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<sup>331</sup> Chiesa and Toscano. 2007, p.118

morally culpable manner . . . And third, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive.”<sup>332</sup>

Within neoliberal capitalism, as Chapter 8 will discuss, the nineteenth-century notion of the stakeholder as a ‘man of property’ in the vein of Soames Forsyte in John Galsworthy’s *Forsyte Saga* has largely broken down or, rather, been rendered porous<sup>333</sup>. This does not mean the capitalist stakeholder has vanished. Instead neoliberalism induces a wider popular desire for economic privilege - the result of, what Jodi Dean calls, ‘the extent of the class power that has gotten us to think in terms of competition, efficiency, stock markets, bonuses, and financial success’<sup>334</sup>.

For all stakeholders it is investment and generally maintaining high levels of economic engagement that is key because this provides the means to disavow castration as the lack that psychoanalysis maintains is at the core of the subject. They do so by committing the stakeholder not simply to the limited scope of the personal fetish, but more completely to the fantasies aroused by capitalism of attaining a certain perfection or complete satisfaction in or through private property and other capitalist institutions, including markets<sup>335</sup>. Further, the stakeholder’s investment includes a commitment to as many of the ways and means necessary to maintain this fantasy, hence ECJ, cast in this context, is elevated to levels of devotion whereby the notion of complete justice is itself a sublimation of stakeholder desire caught in the process of providing an object to be believed in.

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<sup>332</sup> Pawlowski, 2001, p.80

<sup>333</sup> John Galsworthy. 2001. *Forsyte Saga, Volume 1: The Man of Property, In Chancery, and To Let*. London Penguin Classics

<sup>334</sup> Dean, 2012, p.73; see also, Stuart Hall. 2017. *Selected Political Writings: The Great Moving Right Show and Other Essays*, Edited by Sally Davidson, David Featherstone, Michael Rustin, and Bill Schwarz. Durham: Duke University Press; Guy Standing. 2017. *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay*. London: Biteback Publishing

<sup>335</sup> Schroeder, 2004



Equity drives or induces stakeholder engagement in many ways through different mechanisms and instruments, some of which are described in the following passage by the economist Anthony Atkinson:

When politicians talk of Britain becoming a "property-owning democracy", they often mean property in the sense of housing. This is, however, a rather special asset, generating a return in the form of imputed income. Other forms of popular wealth, such as savings and bank accounts or pension funds, are held via financial institutions. The latter hold the share certificates. One consequence is that part of the capital income now accrues to the financial-services sector that manages these funds. There is a wedge between the rate of return to capital and the income received by savers. The growth of popular wealth has contributed to the increased "financialization" of the economy. (This, in turn, has implications for the separation of beneficial ownership and control...) <sup>336</sup>

Housing, share certificates, capital income from intangibles, and, perhaps most revealingly, 'the separation of beneficial ownership and control' that is the *sine qua non* of trusts, all of these feature within the scope of Equity's jurisprudence. Engagement with these areas suggests that stakeholders do not passively or reluctantly answer the ideological 'hail' of capitalism. On the contrary, they unreservedly put themselves at the centre of economic rationalisations conducted in the name of capital. Moreover, it reveals that Equity is a crucial tool enabling stakeholders in their enjoyment of and belief in capitalism.

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<sup>336</sup> Atkinson, 2015, p.71

### 3. Private property power

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The basic requirement for understanding contemporary [Equity] is to look at the socioeconomic system thus produced and to observe its transposition, through the medium of law, into an imaginary construct that accommodates the progressive elements of the attack on classical law while ultimately securing the system's appearance of legitimacy<sup>337</sup>.

There can be no mistaking the relationship between what is here called the private property order and the fact that such an order consists of what Marx called commodities. As the lens through which to describe and understand the point at which capitalism, the stakeholder and Equity meet, therefore, Equity's part in the administration of the private property order is of crucial importance. As Todd McGowan maintains, 'enjoyment of the commodity in contemporary capitalist society requires a delicate balancing act between ignorance and knowledge', and the suggestion here is, that in regard to the private property order, Equity facilitates enjoyment in this way<sup>338</sup>. This involves dealing with the influence of capitalist class power on the property concept, and that concept as peculiarly *private* in nature and thus determined legally via, for example, the dictate of ownership rather than mere possession, as the source of what J.A. Jolowicz calls 'selfish litigation': 'litigation in which the actual concern of the parties is to promote or to protect only their own 'private' interests'<sup>339</sup>.

'Private', Raymond Williams explains, 'is still a complex word but its extraordinary historical revaluation is for the most part long completed'<sup>340</sup>. Of the great number of instances of the term Williams traces, it is private as a 'conventional opposition to what is public' that is significant here<sup>341</sup>. In her discussion on the contrast between public and private realms, Hannah Arendt suggests a similar definition. For Arendt, privacy is only

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<sup>337</sup> Peter Gabel and Jay Feinman. 1998. Contract Law as Ideology, in, *The Politics of Law: A Progressive Critique*. 3<sup>rd</sup> Edition. Edited by David Kairys. New York: Basic Books, p.504

<sup>338</sup> McGowan, 2016, p.103

<sup>339</sup> Jolowicz, 1983, p.305

<sup>340</sup> Raymond Williams. 1988. *Keywords: A vocabulary of culture and society*. London: Fontana Press, p.242

<sup>341</sup> Williams, 1988, p.242

given meaning by its opposition to the public realm, one in which everything 'can be seen and heard by everybody and has the widest possible publicity'<sup>342</sup>. Further, 'the term "public" signifies the world itself, in so far as it is common to all of us and distinguished from our privately owned place in it [...] The Public realm, as the common world, gathers us together and yet prevents our falling over each other'<sup>343</sup>. Both Arendt and Williams point to an important factor in the context of property: what is private must somehow be taken from a more fundamental state of openness, and that taking subsequently enforced by right, hence Jolowicz's contrast between private and public relating to the difference between 'selfish' and 'unselfish' litigation, where the former reflects a defence of private interests brought voluntarily by the plaintiff or claimant<sup>344</sup>.

Private property, even when it exists in an open, public domain which allows non-owners some form of access to it is nevertheless always already in a state of withdrawal or opposition that drives non-owners away and prevents access or forms of adverse control or possession. For Frederick Hayek, the private nature of property in terms of rules of demarcation makes possible 'the delimitation of protected domains of individuals or groups', and is 'as well as scientific truth as any we have attained in this field'<sup>345</sup>. Whilst serving a deliberate ideological purpose in Hayek's thinking and work as means of defeating the socialist tendencies that he viewed as a significant threat to society, private property was also fundamental to Hayek's 'inseparable trinity' along with law and liberty<sup>346</sup>. There can be no law in the sense of universal rules of conduct', argued Hayek,

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<sup>342</sup> Hannah Arendt. 2000. The Public and the Private Realm, in *The Portable Hannah Arendt*. Edited by Peter Baehr. London: Penguin, p.199

<sup>343</sup> Arendt, 2000, p.201

<sup>344</sup> Jolowicz, 1983, p.305-312

<sup>345</sup> Hayek, 2013, p.103

<sup>346</sup> Hayek, 2013, p.102

‘which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act’<sup>347</sup>.

Following Hayek’s ideas it is important to understand the relevance of Equity as a mode of *private* and *property* law in order to further develop the connection between Equity, self-interest (what is arguably Hayek’s notion of freedom to act), and capitalism. In his reading of Marx’s *Capital*, Étienne Balibar makes a similar distinction, although he does not proceed further than questioning the distinction between property law and the concept that necessarily informs it, namely property as such. ‘[D]istinguishing sharply between the connexion that we have called ‘property’ and the *law of property*’, Balibar maintains, ‘is of fundamental importance in characterizing the degree of relative autonomy of the economic structure with respect to the equally ‘regional’ structure of the ‘legal and political forms’, i.e., in initiating an analysis of the articulation of regional structures or instances within the social formation’<sup>348</sup>. As a form of private property law Equity contributes significantly to articulations of the regional structures Balibar highlights. Advancing Balibar’s thesis to acknowledge Equity as private law is vital because it reveals the extent to which Equity is shielded from onerous doctrinal interventions in the fields of public and criminal law, namely in respect of ‘constitution, maintenance and regulation of government authority’<sup>349</sup>. To echo Arendt, Equity’s private law status prefigures juridical conditions that resist on behalf of stakeholders the widest possible publicity. Roger Cotterrell has argued that the ‘ideological significance of the distinction between private and public law is to affirm the existence of a private sphere (civil society) distinct from the state and unaffected by the public law which

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<sup>347</sup> Hayek, 2013, p.102

<sup>348</sup> Étienne Balibar. 2009. On the Basic Concepts of Historical Materialism, in Louis Althusser and Étienne Balibar. *Reading Capital*. Translated by Ben Brewster. London: Verso, p.254

<sup>349</sup> Martin Loughlin. 2003. *The Idea of Public Law*. Oxford: Oxford University Press, p.1

structures the state; a private sphere in which individuals deal with each other as equal subjects and in which the existence of private power is legally unrecognised', and the prerequisite of a substantial claim that we find in this instance clearly deepens the ideological significance referred to by Cotterrell<sup>350</sup>. We will return to Equity's particular contributions to property law shortly.

### 3.1 The property concept

'Property' is a notoriously difficult concept to define, not least because many aspects and characteristics of property tend to be emphasized in different ways by the various disciplines that seek to contextualise and explain it. The classic contemporary statement on private property is that it is not simply a relationship between a person and a thing, but a collection or bundle of rights. These rights underscore duties and obligations that individuals hold in respect of one another. But, importantly, they also extend control over property from mere possession to ownership, thereby unleashing a range of further possible actions (or inactions) and interests the owner has rights over. These include rights to *use* the thing in which the property right resides as the owner sees fit, as well as the right to *exclude* the world from it<sup>351</sup>. Of all property rights, exclusion appears the most effective for explaining not simply the concept of property but the particular jealous nature of ownership that demands privacy. Exclusion, notionally a right held against the whole world, is a very good way of both withdrawing and concealing property from public interference. Whether property exists in a physical or tangible form, for example, land or chattels, or in an intangible form such as debts, securities or future interests, what remains consistent is the degree of control that factors such as exclusion allow. Exclusion in conjunction with use, which, importantly, includes rights of transferability for value,

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<sup>350</sup> Cotterrell, 1987, p.83

<sup>351</sup> Penner, 1997, p.71

are central to explaining the augmentation of rights and benefits that Equity brings to the general scheme of property law beyond basic legal ownership, as well as the basis of Equity's remedial action<sup>352</sup>. 'Law must also define possession by detailing those whom the possessor can exclude and under what circumstances she can exclude them', maintains Jeanne Schroeder, concluding that in a world 'in which third parties or dynamite exists, any limitation of a possessory right is equivalent to imposing an intersubjective valuation on the possessor. Property remedies inevitably merge into liability remedies, and liability regimes presuppose a property regime'<sup>353</sup>.

In the introduction to this thesis I claimed that private property (as the main focus here) is contingent on notions of resource *scarcity* that give form to social relations (and market relations in a neoliberal capitalist schema) through bundles of legal, moral and customary rights, concepts and practices including *inter alia* those of use, possession, ownership, enjoyment and exclusion. In the private property context, these mechanisms can assume a particular quality as *safeguarding* functions that guarantee full assignment of separate objects (things) to individuals. As Thomas C. Grey maintains: 'Most people, including most specialists in their unprofessional moments, conceive of property as *things that are owned by persons*. To own property is to have exclusive control of something - to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it'<sup>354</sup>. And Grey sums up the perception of ownership as a safeguarding mechanism over private property maintaining that, 'legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership'<sup>355</sup>. Similarly, Michael A. Heller

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<sup>352</sup> Sarah Worthington argues that transferability, and the fact that property can be traded, is key because it gives property commercial value. (Worthington, 2006, p.52)

<sup>353</sup> Schroeder, 2004, p.183

<sup>354</sup> Thomas C. Grey. 1980. The Disintegration of Property. *Nomos*, Vol. 22, Property, p.69

<sup>355</sup> Grey, 1980, p.69

argues that private property requires that 'one owner have full decisionmaking [*sic*] authority over an object, subject to some common law and regulatory limits'<sup>356</sup>. Freed from these restraints the perception continues that rights to private property ought to be able to create or generate value, which when maximised and exploited contributes to the wealth of an individual or corporate stakeholder. This includes, notably through exposure to market forces.

'The bedrock of the theory of the market economy is the assumption of private property rights', argues Samuel Bostaph, and without 'the command of property assured to the individual by his or her property rights, there can be no regularity and stability in the exchange of things. Without stability in exchange, there will prices set in markets that reflect market conditions of demand and supply, themselves reflective of relative resource abundance. Without such market prices, there is no basis for rational individual planning in consumption or production activities'<sup>357</sup>. In his list of eleven bases of private property, Honoré notes, in particular, the 'right to the capital value' of one's private property, including 'alienation, consumption, waste, or destruction'<sup>358</sup>. Although as Richard Posner points out, the generation of wealth in this way – through freely transferable rights to property for value - must also account for the costs of the property-rights system in both obvious and subtle ways<sup>359</sup>. Following Posner here we can see that as a consequence, and especially when considered in conjunction with questions of justice, property means something different to the lawyer than to the economist: the former focuses on rights and practice as the basis of the property concept, the latter on

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<sup>356</sup> Michael A. Heller. 1998. The Tragedy of the Anticommons: Property in the Transition from Marx to Markets. *Harvard Law Review*, Vol. 111, No. 3 (January), p.662

<sup>357</sup> Samuel Bostaph. 2006. Utopia from an Economist's Perspective. *Thomas More Studies* 1, p.196

<sup>358</sup> Honoré, 2013, p.568

<sup>359</sup> Posner, 1986, p.32

the value of private ownership and the relative merits of modes of distribution<sup>360</sup>. For the benefit of wider contextual considerations of the property concept within neoliberal capitalism, it is considered necessary to include legal and economic views on property. Further, as already implied it is worth looking closely at how property is defined within the conjoined fields of law and economics, and in particular in the work of Richard Posner. Posner's juridical reasoning bridges a number of aspects covered by this thesis: the utilitarianism of Jeremy Bentham, the liberalism of nineteenth-century reformists and classical economists, and the neoliberalism of Frederick Hayek. We will examine Posner's idea of property shortly.

Kevin and Susan Francis Gray begin their definition of 'the elusive concept of property' as follows:

We commonly speak of property as if its meaning were entirely clear and logical, but property is a conceptual mirage which slips tantalisingly from view just when it seems most solidly attainable. Amongst the misperceptions which dominate the conventional analysis of both lay persons and lawyers is the lazy myth that property is a 'monolithic notion of standard content and invariable intensity'. Our daily references to property, therefore, tend to comprise a mutual conspiracy of unsophisticated semantic allusions and confusions, which we tolerate – frequently, indeed, do not notice – largely because our linguistic shorthand commands a certain low-level communicative efficiency<sup>361</sup>.

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<sup>360</sup> See: Posner. 1986 (law and economics); J.E. Penner, 1997 (the lawyer); John E. Roemer. 1996. *Theories of Distributive Justice*. Cambridge: Harvard University Press (the economist).

<sup>361</sup> Kevin Gray and Susan Francis Gray. 2009. *Elements of Land Law*. 5<sup>th</sup> Edition. Oxford: Oxford University Press, p.86



As later discussions unpacking Equity fetishism in more detail will show, semantic allusions, the language (of Equity) that Gray and Gray highlight above, play a crucial role in structuring the fantasy of private property law within capitalism<sup>362</sup>. Therefore, whilst Gray and Gray consider their task ‘to jolt ourselves out of our traditional, reassuringly three-dimensional, imagery about property’ by attacking ‘limitations of the property reference’ and the ‘mistaken reification of property’, this thesis will demonstrate why these features of the stakeholder relationship to property are in actuality critical, at least in terms of sustaining the private property regime within capitalism<sup>363</sup>. And this latter point, as a political consideration, is one not overlooked by Gray and Gray it is important to add, but rather seized upon by them as the ultimate definition of property:

Deep at the heart of the phenomenon of property is the semantic reality that ‘property’ is not a thing, but rather the condition of being ‘proper’ to a particular person (eg ‘That book/car/house is *proper* to me’). For serious students of property, the beginning of truth is the recognition that property is not a thing but a *power relationship* – a relationship of social and legal legitimacy existing between a person and a valued resource (whether tangible or intangible). To claim ‘property’ in a resource is, in effect, to assert a significant degree of control over the resource. ‘*Property*’ *ultimately articulates a political relationship between persons* [emphasis added]<sup>364</sup>.

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<sup>362</sup> Margaret Davies makes a similar critical argument concerning the symbolic and metaphorical power of property within the context of law and economic discourse: ‘The forms of oppression which accumulate around the myth of property do not rest merely in formal legal relationships, but also in the way that property rhetoric is extended and used to structure the realm of the social’ (Margaret Davies. 1999. *Queer Property, Queer Persons: Self-Ownership and Beyond*. *Social & Legal Studies*, Vol. 8, Issue 3 (September), p.329)

<sup>363</sup> Gray and Gray, 2009, pp.86-87

<sup>364</sup> Gray and Gray, 2009, pp.87-88

The institutions and systems of civil justice have over time shaped the broad nature of the property concept as defined variously above and, therefore, also the social and political relationships that according to Gray and Gray constitute property as such. In their insistence on the relational basis of property, Gray and Gray are echoing, at least to some degree, the ideas of Evgeny Pashukanis. Within capitalism Pashukanis recognised the significance of a wide and integral set of legal relations:

In as much as the wealth of capitalist society appears as ‘an immense collection of commodities’, so this society itself appears as an endless chain of legal relations. Commodity exchange presupposes an atomised economy. The link between isolated private economic units is maintained in each case by successfully concluded business deals. The legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities<sup>365</sup>.

The extent to which the property concept has deliberately or consciously been defined by law and civil justice for the widest possible benefit, that is, beyond the needs and desires of privileged networks of capitalist power within societies, has been covered and challenged by a number of critical theories in recent decades, including feminist and queer theories of property, and within that Equity and trusts<sup>366</sup>. Margaret Davis, for instance, has shown how the nature of social relations in property are particularly pertinent from the point of view of a queer critique of property law, which echoes Gray

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<sup>365</sup> Pashukanis, 1989, p.85

<sup>366</sup> See for example: Anne Bottomley (ed.) 1996. *Feminist Perspectives on the Foundational Subjects of Law*. London: Cavendish Publishing; Davies, 1999, pp.327-352; Rebecca Probert. 2001. Trusts and the modern woman – establishing an interest in the family home. *Child and Family Law Quarterly*, Vol. 13, No. 3, pp.275-286; Rosemary Auchmuty. 2012. Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women. *Feminist Legal Studies*, Vol. 20, Issue 2 (August), pp.71-87

and Gray's claims that property 'has an unavoidably intersubjective element, meaning that although it may attach to a concrete or abstract object, 'property' is primarily a relation between legal subjects which has things as its focus'<sup>367</sup>. For Davies the role of property law is to determine the quality 'mine', moreover, that property is 'also characterised by an immensely strong symbolic power and is both expressive and constitutive of the person'<sup>368</sup>. This notion of property and legal relationships in Davies' particular reading reflects certain social hierarchies 'organised around sex and sexuality'<sup>369</sup>. This thesis follows a very similar notion of property to Davies', albeit one in which the metapsychology of sexual desire manifests in the stakeholder's concealment of castration as fundamental basis of subjectivity and being in the world, a form of sexual desire projected onto and mediated by a conjunction of law (Equity and institutions of civil justice for example) and economics (capitalism and capitalist logic of efficiency, competition, and so on) that finds form, so to speak, in ECJ and Equity fetishism.

Administration of the private property order in line with the notion of complete justice *qua* civil procedural and substantive merits-based justice cuts across legal and economic definitions of property and the ways in which property is administered, protected, transacted and distributed. Key to civil justice administration is supporting a regime of private property ownership that enfolds the means of wealth extraction from property – Honoré's 'right to capital'<sup>370</sup>. Within civil justice creative approaches to property rights and ownership are symptomatic of the 'flexible' contributions Equity makes to forms of private, personal and corporate wealth generation. As Lord Neuberger maintains: 'Like any organic entity, equity has always developed as a result of both the internal influences

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<sup>367</sup> Davies, 1999, p.328

<sup>368</sup> Davies, 1999, p.328

<sup>369</sup> Davies, 1999, p.329

<sup>370</sup> Honoré, 2013, p.568

from its genes received from its forebears and the external influences which permeate its environment. Its parental genes are fairness and flexibility, as equity was developed to mitigate the rigours and technicalities of the common law. Its environmental influences are multifarious, but they include the need for consistency and certainty, without which any legal code risks falling into disrepute'<sup>371</sup>. Principle examples of Equity's influence on the legal landscape include the trust, which in spite of assuming a variety of forms seen as socially progressive, including as charitable, is notable for tax avoidance and 'aggressive financial management'<sup>372</sup>. This opportunistic and morally questionable, albeit entirely legal, use of trusts based on the desire to reduce stakeholder tax liabilities in ways that, as the *Tax Justice Network* argue, impoverish the national tax base and offend public interest presumably counts as one of Neuberger's 'environmental influences'<sup>373</sup>. We see in Neuberger's euphemism, therefore, a reluctance to name capitalism (let alone neoliberal capitalism), as that which commands law and is the one that ultimately has the power to bring it into 'disrepute'. In later chapters, however, we will see that Lord Neuberger has not always been so veiled as to the realities of the role of law in contemporary capitalist society.

*Contra* Neuberger's reluctance to name the *disreputee qua* capitalist stakeholder, I claim that trusts, which will be discussed further later in this chapter, signal a proliferation of wealth generating opportunities suited to stakeholders, who, in accordance with capitalist ideology are keen to demonstrate not so much that 'a society that safeguards

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<sup>371</sup> Lord Neuberger. 2014. Equity –The soul and spirit of all law or a roguish thing? Lebane Lecture 2014, Supreme Court of New South Wales, Sydney. 4 August. [Online] Available at: <https://www.supremecourt.uk/docs/speech-140804.pdf> (accessed 15 June 2018) at 7

<sup>372</sup> Brooke Harrington maintains: 'While STEP and many wealth management practitioners see the use of offshore finance as legitimate and necessary, most outside the industry see it as a transparent scam' (Brooke Harrington. 2016. *Capital without Borders: Wealth Managers and the One Percent*. Cambridge: Harvard University Press, p.131); see also: Worthington, 2006, pp.51-86

<sup>373</sup> See: <https://www.taxjustice.net/> (accessed 15 June 2018)

property is wealthier than one that does not', but certainly that the *private* stakeholder who does will be wealthier than the one who does not<sup>374</sup>. Trusts and the property that constitute them are, as Gray and Gray contend, vehicles for ideology<sup>375</sup>. Moreover, beyond the notion of property as an 'epithet used to identify that which people most greatly value', I argue private property within capitalism is valorised on an even more abstract level, that of wealth creation, to which desires more easily attached and around which fantasies more easily gather<sup>376</sup>. As Freud maintained, 'the mutual relations of men are profoundly influenced by the amount of instinctual satisfaction which the existing wealth makes possible'<sup>377</sup>. Further, Penner maintains in his discussion of Hannah Arendt's theories of public and private that circulate her interpretation of the private property concept as 'a kind of necessary contrast to, and base from which a person could enter the public realm. This is all to be sharply contrasted with wealth. Wealth is merely economic power, undifferentiated and unrealized. Wealth is necessary to sustain property and thus the private realm, but it is not to be exalted for its own sake'<sup>378</sup>. The crucial point that Penner touches on is that private property signals 'ontological privilege' and above all else power, making it both something stakeholders desire and to a varying extent can be satisfied by if and when they are able to assert their proprietary interest<sup>379</sup>.

Reflexively property as power can also be and is used to constrain and delimit the possibilities of those persons unable to assert such interests, including where they lack economic, social or political power<sup>380</sup>. In order for that bargain and negotiation between

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<sup>374</sup> Worthington, 2006, p.53

<sup>375</sup> Gray and Gray, 2009, p.88

<sup>376</sup> Gray and Gray, 2009, p.88; see also: Wood, 2017, p.111 – 'this emphasis on the creation of exchange value as the basis of property is a critical move in the theorization of capitalist property'.

<sup>377</sup> Freud, 2001e, p.6

<sup>378</sup> Penner, 1997, p.216

<sup>379</sup> Jason Glynos. 2012. The Place of Fantasy in a Critical Political Economy: The Case of Market Boundaries. *Cardoza Law Review*, Vol. 33, Issue 6 (August), p.2376

<sup>380</sup> Margaret Jane Radin. 1996. *Reinterpreting Property*. Chicago: University of Chicago Press

desire and satisfaction to be made or at least appear possible, therefore, requires mediating institutions and systems, hence the role of civil justice within capitalism. Moreover the particular contributions of Equity *qua* ECJ, as a means of constructing and maintaining fantasies around property. 'The fascination of property', argues Margaret Davies, is the ways 'in which the various dimensions of the property as social myth and legal category interact in a multitude of inexpressibly complex ways'<sup>381</sup>. Moreover Davies concludes, with an explanation worthy of a description of the role of Equity fetishism, 'because the central social symbolism of property is of something fixed, certain, delimited and absolute, this symbolic and material mobility is forgotten or even repressed in a gesture which reinforces the ideology of centralised power and masks the underlying circulation of meanings'<sup>382</sup>.

### 3.2 Law and economics

The economics of property, wealth and power leads us to a consideration of the property theory devised by the conjoined field of law and economics, and in particular by American jurist and Judge Richard Posner, whose major influence is acknowledged in the wide-ranging literature on the subject that has developed since the 1970s<sup>383</sup>. Law and economics has been pervasive in legal practice and academia for a number of decades and is a product of shifts in legal reasoning developed by the likes the Chicago school<sup>384</sup>. Roger Cotterrell writing in the closing decades of the twentieth century remarked that the economic analysis of law is a 'form of legal scholarship now widely established and

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<sup>381</sup> Davies, 1999, p.330

<sup>382</sup> Davies, 1999, p.330

<sup>383</sup> For analysis of Posner's influence, as well as his work, see, for example: David Campbell. 2012. Welfare Economics for Capitalists: The Economic Consequences of Judge Posner. *Cardoza Law Review*, Vol. 33, Issue. 6 (August), pp.2233-2274

<sup>384</sup> Steve Hedley argues that 'at root economics is not a theory aimed at explaining or justifying law', instead it provides 'an external – economic efficiency – by which to evaluate legal outcomes', thus economics 'is a theory about costs and benefits, how they are distributed and they influence behaviour' (2011, p.99); Davies, 2017

recognised in American law schools and of increasing significance in the British academic legal world'<sup>385</sup>. The aim of applying economics to law was for its proponents, as Cotterrell maintains, to fill a lack of rationality in legal reason within the Common Law, to 'promote an efficient allocation of resources in society', a competitive free-market influenced 'invisible hand' theory insofar as it claims that, whether or not the judges knew what they were doing in terms of economic rationality in developing common law rules, the case-by-case evolution of common law has in fact led to outcomes with a high degree of allocative efficiency'<sup>386</sup>. And it is on this latter point that Cotterrell cites the work of Richard Posner.

For William Davies, Posner is key to understanding the major shift in legal reasoning that occurred in the latter half of the twentieth century, whereby the disciplinary line that separated law from neo-classical economics (lawyers from economists) blurred and arguably even vanished, paving the way for the comprehensive economization of law<sup>387</sup>. Echoing the unification and resultant complete justice of Equity and Common Law after Judicature, Davies makes a case for the fusion of law and economics with Posner as a central actor<sup>388</sup>. The fusion of law and economics meant neo-classical economics acquired a 'liberal spirit' and economists emerged as '*quasi-judicial* in their authority', which included ensuring 'all combatants [claimants and defendants, creditors and debtors, and so on] are equal before the measure of efficiency, in the same way that judges ensure that all citizens are equal before the law'<sup>389</sup>. Furthermore, the economic empiricism applied to legal situations by the likes of Posner revealed a 'purported fairness and blindness' that

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<sup>385</sup> Roger Cotterrell. 1989. *The Politics of Jurisprudence A Critical Introduction to Legal Philosophy*. London: Butterworths, p.208

<sup>386</sup> Cotterrell, 1989, p.209

<sup>387</sup> Davies, 2017, p.76

<sup>388</sup> Davies, 2017, pp.79-91

<sup>389</sup> Davies, 2017, p.77

was central to neoliberal juridical thinking - the former of those, at least, being an equitable referent.

Duncan Kennedy, to, is sceptical of the mix of law and economics espoused by the likes of Posner, not least because, as Cotterrell claims, it leads to over-rationalisation. Kennedy's scepticism parallels Yip and Lee's concerns, at the level of Equity doctrine, of the effect of 'commercial pragmatism' on Equity<sup>390</sup>, an effect, I argue, symptomatic not of a failure or flaw in the internal logic and reason of law but of the dominion of economic over legal reason that punctures the carapace of doctrinal reasoning and injects rationalities of *inter alia* market solutionism<sup>391</sup>. For Kennedy classical economics 'needed a theory of law if they were to make good their basic claims about the nature of economic life', and were content 'with frequent allusions to the "sacredness" of property and to the disastrous consequences of "government interference with contracts"'<sup>392</sup>. Further, and here we can see the attractiveness of Equity to economic thought, Kennedy claims that proof 'of the validity of economic laws relied crucially on concepts like freedom and justice. They [classical economists] spent much of their time trying to persuade their readers not of the existence of particular facts but of the "naturalness", "fairness", or "optimality" of those facts'<sup>393</sup>.

Posner's description of the property concept begins in the Common Law as 'applied by the royal law courts of England in the eighteenth century', and is subdivided across three domains: the law of property, the law of contracts, and the law of torts<sup>394</sup>. For the purposes of this thesis, it is the first two, the laws of property and contract, which are of

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<sup>390</sup> Cotterrell, 1989, p.209; Yip and Lee, 2017, p.648

<sup>391</sup> Cotterrell, 1989, p.209

<sup>392</sup> Duncan Kennedy. 1985. The Role of Law in Economic Thought: Essays on the Fetishism of Commodities. *The American University Law Review*, Vol. 34, No. 4 (Summer), p.950

<sup>393</sup> Kennedy, 1985, p.949

<sup>394</sup> Posner, 1986, p.29



most interest and the influence of Equity jurisprudence (what Posner refers to as a specialized subcategory) on them<sup>395</sup>. Posner's reference to the historical roots of the property concept and thus his description of property more generally must be read in light of the conjunction of the socio-psychological with the economic that draws him to a fundamental relationship between property, efficiency, rationality and self-interest. For Posner, economics must explore the implications of 'assuming man is a rational maximizer of his ends in life, his satisfactions – what we shall call his "self-interest"<sup>396</sup>. In that sense Posner's analysis of property is remarkably similar to the one undertaken by this thesis, the crucial difference being the political motivations and justifications Posner relies upon are not ones that are shared here, and perhaps most notably with regard to justice, which is allied to robust and definitive ownership of private property in Posner's private law examples (he also relies on public and criminal law examples in his account of law and economics which account for different ideals of justice), and over which he claims, 'economics can provide value clarification by showing the society what it must give up to achieve a noneconomic ideal of justice'<sup>397</sup>. Posner's logic here is both fascinating and somewhat contradictory, not least because he insists on economics for evaluating justice in order, or so it seems, to justify how to define justice *without* economics, a point he justifies by suggesting that the 'demand for justice is not independent of price'<sup>398</sup>.

Substantively Posner's approach to property turns on the legal protection of transferable property rights in order to 'create incentives to use resources efficiently'<sup>399</sup>. 'The proper

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<sup>395</sup> Posner, 1986, p.29

<sup>396</sup> Posner, 1986, p.3

<sup>397</sup> Posner, 1986, p.26

<sup>398</sup> Posner, 1986, p.26

<sup>399</sup> Posner, 1986, pp.30-31

incentives are created by parcelling out mutually exclusive rights to the use of particular resources among the members of society', claims Posner, and whilst his initial example chooses land as the property in question he is quick to acknowledge that the same principle 'applies to all valuable resources'<sup>400</sup>. To all intents and purposes, Posner's ideas here do not depart greatly from conventional notions of the property concept outlined above. But the centrality of the logic of competition and efficiency to his idea of property demonstrate the univocal economic potentialities Posner considers all forms of property to possess. Like buried treasure or a seam of coal, the wealth-giving properties of private property are, on Posner's account, simply waiting to be found and realised by the one who *owns*. And in this determination he is arguably more honest in his definition of property than many others reluctant to admit the indisputable nature of property's ideological role within capitalism, rather than property being inherently defined as a product of legal determinacy<sup>401</sup>. What is more Posner's notion of precedent as a product of legal rulemaking that constitutes 'capital stock' is another means by which he reveals the grasp capitalism has on law, albeit one he supports rather than contests, so too in his application of calculation to civil procedure rendering it the goal of procedure economic<sup>402</sup>.

Furthermore, Posner considers this approach a viable route for governments. In other words, the shaping of public property in the mould of private property reasoning – precisely the type of strategy used by neoliberal stakeholders, as Chapter 8 will discuss. 'The economist can assist the policymaker not only by explaining the effects of a policy

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<sup>400</sup> Posner, 1986, p.30

<sup>401</sup> It is important to note again that Posner's political motivation for a law and economics appraisal that reveals the capitalist logics operating through private property and its juridical administration are not the same political motivations for a turn to, or rather appreciation of, law and economics here.

<sup>402</sup> Posner, 1986, p.509 and p.517

on the efficiency with which resources are used', claims Posner, 'but also by tracing its effects on the distribution of income and wealth'<sup>403</sup>. In conjunction with property law, Posner also considers the role of contract in shaping his definition of the property concept. As a precursor to a closer look at Equity's interventions in the private property regime and to conclude this section, therefore, we will look at aspects of contract law within Posner's property theory and also consider how the place of contract has been extended due to the influence of law and economics.

Citing US valorisation of freedom of contract as 'necessary to preserve, or simulate the results of, free markets' during the nineteenth century and continuing through the latter part of the twentieth century (Posner was initially talking about the 1970s, although the text referenced here is an edition from the 1980s), Posner traces the commercial influence of contract on the transformation of US law and judicial reasoning, through the revival of thinking that had, since the 1930s, turned against contract as a 'grotesque distortion' of constitutional principle<sup>404</sup>. As the preferred legal mechanism of classical economics and thus central to 'maximisation of wealth', what Jeanne Schroeder's calls the proposition most closely associated with Posner, the revival of contract also elevated the status of economics in law, which in turn elevated the status of, indeed emphasised, economic rights and liberties that, through the medium of contract, reflected 'dominant public opinion'<sup>405</sup>. Thus what the public desired, claims Posner, was to be freely contracting economic citizens, and it was wrong for judges to deny this fact, or for the law to countermand it, both of which signalled a justice system that was 'out of step'<sup>406</sup>.

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<sup>403</sup> Posner, 1986, p.71

<sup>404</sup> Posner, 1986, p.589

<sup>405</sup> Schroeder, 2004, pp.208-229; Posner, 1986, p.590

<sup>406</sup> Posner, 1986, p.590

Posner does not simply make the case for freedom of contract as an economic right or liberty exercisable at a constitutional level, however, instead he locates contract as fundamental to intersubjective bargaining, and thus implies factors of shame and contentiousness as structuring all forms of transaction. 'Someone who is known not to perform his side of bargains will find it difficult to find anyone willing to make exchanges with him in the future', claims Posner, 'which is a costly penalty for taking advantage of the vulnerability of the other party to a contract, the vulnerability that is due to the sequential character of performance'<sup>407</sup>. And following Hobbes's conception of the social contract, Posner defines the rationale for contract being, 'to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and make costly self-protective measures unnecessary'<sup>408</sup>. The 'familiar' and desirable role of contract is, therefore, economizing transaction costs, and whilst this may begin or relate directly to an *actual* commodity of financial transaction, the efficiency gains ought, by Posner's reasoning, to extend to the behaviour of contracting parties<sup>409</sup>. Further, the regulation of party behaviours that Posner sees contract performing perhaps explains why he places less emphasis on the role of fiduciary obligations to achieve that end, in contrast for example to his contemporary Tamar Frankel who suggests characterizing fiduciary relationships as contract 'renders irrelevant the main focus of fiduciary law: the *relative power relationship among parties*'<sup>410</sup>.

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<sup>407</sup> Posner, 1986, p.81

<sup>408</sup> Posner, 1986, p.81

<sup>409</sup> Posner, 1986, p.100

<sup>410</sup> Tamar Frankel. 2014. Watering Down Fiduciary Duties. *Philosophical Foundations of Fiduciary Law*. Edited by Andrew S. Gold and Paul B. Miller. Oxford: Oxford University Press, p.247

For Posner, the fiduciary principle is simply 'law's answer to the problem of unequal costs of information', but concludes that most 'consumers' are intelligent enough to protect themselves, presumably by contract, without needing to rely on fiduciary law<sup>411</sup>. A position that is contested by Daniel Markovits who views fiduciary duties as 'natural response to the structural problems out of which fiduciary relations generally arise' and which cannot be construed by the contract<sup>412</sup>. Fiduciary obligations, therefore, substitute 'for the specification of contract duties and the verification of importance'<sup>413</sup>. This can also be seen as a so-called 'agency problem' that arises from incomplete contracting and sets into action an expansive application of core fiduciary duties of loyalty and care<sup>414</sup>. Posner's treatment of the fiduciary principle may appear cursory and certainly a second-order mechanism compared to contract, but I conclude with it here as a means of moving on to look in more detail at Equity's peculiar contributions to private law, including fiduciary doctrine. Moreover, with Markovits' notion of *substitution*, and the ideal of *completing* the contract as, I argue, symptoms of Equity fetishism residing in the folds of the laws of property, contract, and fiduciaries.

### 3.3 Fiduciaries

We have reviewed key areas of the property concept and property rights, including Posner's particular interpretation through the lens of law and economics. Further to the definitions above and in order to understand the connection between Equity

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<sup>411</sup> Posner, 1986, p.101

<sup>412</sup> Posner, 1986, p.101; Daniel Markovits. 2014. Sharing Ex Ante and Sharing Ex Post. *Philosophical Foundations of Fiduciary Law*. Edited by Andrew S. Gold and Paul B. Miller. Oxford: Oxford University Press, p.215. As evidence of the resurgent economic analysis in contemporary fiduciary law, see: Robert Cooter and Bradley J. Freedman. 1991. The Fiduciary Relationship: Its Economic Character and Legal Consequences. *New York University Law Review*. Vol.66 (October), pp.1045-1075; Frank H. Easterbrook and Daniel R. Fischel. 1993. Contract and Fiduciary Duty. *The Journal of Law and Economics*, Vol. 36 (April), pp.425-446; Robert Sitkoff. 2011. The Economic Structure of Fiduciary Law. *Boston University Law Review*, Vol. 91, pp.1039-1049

<sup>413</sup> Markovits, 2014, p.215

<sup>414</sup> Sitkoff, 2011, p.1044

jurisprudence, property, and stakeholder desires under capitalism it is necessary to look in more depth at Equity's administration of property and the nature of property as it is defined through private civil law obligations and practices. Historically, as earlier discussions have shown, the concerns of Chancery and of Equity in Anglo-American jurisprudence have been rooted in property and economic rights, including concerns over 'the man forced to pay a debt twice because there is no paper trail; the heir or widow robbed of a trust; those seeking equal pay for work of equal value; those investing their retirement funds in "equities"'<sup>415</sup>. Hence, as a branch of private law Equity has a variety of objectives including coercion, compensation, disgorgement, restitution, and vindication of the personal and proprietary rights that underpin private ownership; ensuring performance of contracts; and maintaining and regulating definitions of duties and obligations within fiduciary law, including those of trustees<sup>416</sup>.

'In general', maintains James Penner, 'equity worked to amend or supplement rules of law over the breadth of private common law'<sup>417</sup>. Equity's responsibility on behalf of stakeholders to uphold private interests in property extends to obligations and duties, as well as to material forms of property and to property rights, and Equity creates, maintains and enforces specific relationships that enable individuals to work on behalf of each other. These relationships are not neutral politically, however, nor are they entirely or explicitly altruistic. Rather, I argue, the relationships are predicated on jurisprudence and forms of procedure that have over time evolved to better promote 'selfishness' and self-interest by ensuring a private property rights regime that corresponds with capitalist and commercialist logic, and that privacy is legitimatised at the level of the social and

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<sup>415</sup> Fortier, 2005, p.82

<sup>416</sup> Burn and Virgo, 2008, pp.5-6; Bryan and Vann, 2012, pp.26-31; Virgo, 2012, pp.19-22

<sup>417</sup> Penner, 1997, p.133

political<sup>418</sup>. ‘The widespread notion that persons have some sort of natural right to own property draws upon the idea that human personhood necessarily contains with it an ability and need to control external resources’, claims Margaret Davies, ideologically ‘property defines an area of privacy, of personal autonomy and personal sovereignty so that the owner has a much greater sphere of protected rights than the non-owner’.<sup>419</sup> Equity’s contribution to and shaping of fiduciary law, introduced above, is a good example of both Penner’s and Davies’ claims and will, therefore, be the focus of this particular section.

Millet LJ described some of the essential characteristics of the fiduciary in *Bristol and West Building Society v Mothew* [1998] Ch 1:

A fiduciary is someone who has undertaken to act for on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of the fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended as an exhaustive list, but is sufficient to indicate the nature of fiduciary obligations<sup>420</sup>.

The fiduciary relationship has, as Anthony Mason suggests, ‘been the spearhead of equity’s incursions into the area of commerce’, and it is vital to a number of commercial

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<sup>418</sup> Jolowicz, 1983, p.305

<sup>419</sup> Davies, 1999, p.335

<sup>420</sup> [1998] Ch 1 at 18

relationships, which indicates its significance to stakeholders, but also, as Joseph F. Johnson Jr has highlighted in terms of modern corporate business practices, shareholders<sup>421</sup>. 'Shareholders, as the residual risk takers, have entrusted their funds to the corporation for the purposes of gaining profit', argues Johnson, and this creates 'a relationship of trust that, in law and equity, takes precedence over the inclination of managers to be charitable with other people's money. It is entirely justifiable' he concludes, 'that corporate managers should consider the legitimate interests of employees, customers, suppliers, and other constituencies, including the community, *but only so long as there is a rational and perceptible nexus between actions favouring other constituencies and long-term shareholder benefit*' [emphasis added]<sup>422</sup>. This final passage is provocative, not least because it highlights the necessity of economic and self-interested benefit as transcendent of the key features of fiduciaries often foregrounded in normative legal thinking and statements, including notions of good faith and fealty that the fiduciary must represent. Johnson's honest appraisal of the brute economics that lie at the heart of fiduciary law is an interesting counterpoint to Henry Smith's interpretation. For Smith, the fiduciary comes with a risk of opportunism that he considers Equity well-suited to mitigate, as a means of anti-opportunism within the private law context<sup>423</sup>. Fiduciary law is, for Smith, an 'outgrowth' of Equity and thus prompts innovation of a 'high moral standard'<sup>424</sup>.

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<sup>421</sup> Anthony Mason. 1994. The Place of Equity and Equitable Remedies in the Contemporary Common Law World. *Law Quarterly Review*, 110(Apr), p.245; Andrew S. Gold and Paul B. Miller. 2014. Introduction. *Philosophical Foundations of Fiduciary Law*. Edited by Andrew S. Gold and Paul B. Miller. Oxford: Oxford University Press, p.1

<sup>422</sup> Joseph F. Johnson Jr. 2005. Natural Law and the Fiduciary Duties of Business Managers. *Journal of Markets and Morality*, Vol. 8, No. 1 (Spring), p.44

<sup>423</sup> Henry Smith. 2014. Why Fiduciary Law is Equitable. *Philosophical Foundations of Fiduciary Law*. Edited by Andrew S. Gold and Paul B. Miller. Oxford: Oxford University Press, p.281

<sup>424</sup> Smith, 2014, p.272



Within the context of modern corporate practices, the promotion of fair dealing practices in commercial settings and across markets, the fiduciary has parried with contract<sup>425</sup>. As a complete justice solution within the Common Law traditions of Western capitalism (the US especially, but also the UK, Canada and Australia) the laws of contract and fiduciary law have, together, provided structure that business has come to rely on<sup>426</sup>. A powerful statement on the significance of fiduciary law, and by extension Equity's role, in this regard was offered by Justice Cardoza:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (*Wendt v. Fischer*, 243 N. Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court<sup>427</sup>

Justice Cardozo's deliberate reference to the market as a place in which honour ought to prevail is telling. Not least, if Posner is to be believed, because this judgment was given

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<sup>425</sup> J.R. Maurice Gautreau. 1989. Demystifying the Fiduciary Mystique. *The Canadian Bar Review*, Vol. 68, No. 1 (March), pp.14-18

<sup>426</sup> *Tracy v Atkins* (1977) 83 DLR (3d) 47 (BCSC); Gautreau, 1989, p.29

<sup>427</sup> Cardoza Ch. J. in *Meinhard v Salmon* 249 N.Y. 458 (N.Y. 1928) at 463 and 464

on the cusp of the re-emergence of contract (after the 1930s) as a mechanism of commercial good faith that did not require the nebulous presentiments of altruism and honour that non-contractualism involved but of which Cardoza was in favour<sup>428</sup>. As Michele Graziadei contends: 'Looking at the history of fiduciary relationships from a contemporary perspective one notices a tension between the increasing tendency to view contracts from a market-orientated and utilitarian perspective and the ideals of liberality and honorary service'<sup>429</sup>.

The equitable fiduciary construct aims to countermand, as Smith suggests, opportunistic actors, and here we need to understand that in relation to corporate, capitalist, and commercial practices in particular. We have earlier discussed the inference of self-interest in the practices of capitalism, as well as the role conscience, has played historically in marking Equity as a moral and just jurisprudence for counterbalancing the tendencies of self-interest. For Graziadei the rejection by English law of the notion of fiduciary obligations as contractual in nature stems from 'the fundamental idea that under English law contracts are self-regarding acts in which each party to the transaction must be presumed to be pursuing his or her own interests'<sup>430</sup>. This means that contract has always served 'one purpose and fiduciary obligations another, and both are conceptually distinct even where obligations generated by the two work to the same purpose'<sup>431</sup>. As we saw above, a key to the fiduciary role is completing incomplete contracts by initiating core fiduciary duties and obligations, notably that of loyalty. But such duties are problematic because they are uncertain and potentially inconsistent with

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<sup>428</sup> Markovits, 2014, p.214

<sup>429</sup> Michele Graziadei. 2014. *Virtue and Utility. Philosophical Foundations of Fiduciary Law*. Edited by Andrew S. Gold and Paul B. Miller. Oxford: Oxford University Press, p.291

<sup>430</sup> Graziadei, 2014, p.291

<sup>431</sup> Graziadei, 2014, p.291

the 'common sense' of contemporary commercial practices<sup>432</sup>. Accordingly, it might be assumed that loyalty ought to remain distinct from contract, at least conceptually-speaking, in order not to risk sully the relative certainty of the contractual ideal. Economic analysis of the interrelationship between fiduciary and contract law disagree, however, and Robert Cooter and Bradley J. Freedman, in particular, argue that 'the duty of loyalty, far from violating the postulate of self-interested behavior, is based upon it. The duty of loyalty must be understood as the law's attempt to create an incentive structure in which the fiduciary's self-interest directs her to act in the best interest of the beneficiary'<sup>433</sup>.

Amid shifting emphases in the nature of the fiduciary within economic and legal terms, as well as wrangles between fiduciary and contract law, the fiduciary, and in particular the loyal one, both mediates and reconfigures the notion of 'mine' that Margaret Davies attributed to the basic role of law in defining private property<sup>434</sup>. At the fundamental level of the property concept, instead of realising direct attribution of the *thing* to me and what is called at Common Law or in Equity 'mine' by means of ownership and possession, the fiduciary interposes a managerial role that does not negate or defeat what is 'mine' but releases me from the onerous need to patrol the boundaries of what is mine in order to exclude others, as well as finds imaginative if banal ways to use and exploit what is mine for economic advantage and gain.

### 3.4 Trusts, securities and the fantasy of finding the lost object

During this final section we will take the opportunity to explore the themes discussed thus far in the context of further discrete areas of Equity's civil and property law

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<sup>432</sup> Cooter and Freedman, 1991, p.1074

<sup>433</sup> Cooter and Freedman, 1991, p.1074

<sup>434</sup> Davies, 1999, p.328

business<sup>435</sup>. Equity's long and notable jurisdiction over what Maitland calls the 'fruitful field' of the trust arguably provides one of the most enduring pieces of evidence of Equity's commitment to ensuring that the ideology of capital is reproduced and that capital class power is further entrenched<sup>436</sup>. The trust as a rudimentary yet innovative legal mechanism predates the rise of capitalism. Moreover, it brings to light that fiduciary obligations and duties, located here in the trustee, are equally longstanding principles only latterly shaped by capitalism. 'The survival of the Anglo-Saxon word 'trust' is evidence enough that a connection has been maintained with an Anglo-Saxon original', argues Gary Watt, 'despite the subsequent overlaying of the Latinate language of 'use', 'conscience' and 'fiduciary duty'<sup>437</sup>.

But an unmistakable shift in trusts law practices occurred once exposed to the forces of capitalist ideology, however, and in particular the demands of commercialism, leading to a significant growth in trusts and an industry to support them for 'valid and legitimate reasons', but equally 'abusive ones'<sup>438</sup>. Remarking on the evolution of trusteeship during the nineteenth century, Chantal Stebbings maintains that the 'new commercialisation of the English society and economy, begun in the late eighteenth century and reached its zenith in the Victorian period, changed the character of the office of trustee [...] the Victorian period saw the transformation of the trustee from amateur to professional, from layman to businessman'<sup>439</sup>. This exposure to commercialism within capitalism also

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<sup>435</sup> The areas that will be discussed here fit into the notion of civil justice that is a main theme for this thesis and help to illustrate Equity's role in civil justice apropos property. They do not however necessarily reflect ECJ as a universal consideration or as the essence of civil justice. This is because, and especially with regard to trusts, Equity maintains sole jurisdiction, hence these areas can be considered discrete. Further, the important point this section makes, as the title suggests, is the relationship of Equity and property in clarifying what constitutes the subject's lost object in terms of property law and the ways in which Equity facilitates the search for that lost object at the level of fantasy.

<sup>436</sup> Maitland, 1969, p.7

<sup>437</sup> Watt, 2012, p.121

<sup>438</sup> John Christensen. 2015. In *Trusts We Trust. The Greatest Invention: Tax and the Campaign for a Just Society*. A Tax Justice Network Production. Margate: Commonwealth Publishing, p.141

<sup>439</sup> Stebbings, 2002, pp.129-130

impacted beneficiaries as it shaped both their demands and entitlements<sup>440</sup>. These factors made and continue to make the trust a pervasive example of the use by capitalist class power of legal mechanisms to further disseminate ideology through exploitation of permissive and flexible laws<sup>441</sup>. As Roger Cotterrell maintains, via trusts (and thus also via the assets held on trust) Equity channels capitalist class power 'rather than obscuring or disguising of it'<sup>442</sup>. And Alastair Hudson maintains that a 'politics of trusts law would have to account, ironically, for the way in which structures which are built on conscience are used to facilitate crime and to avoid taxation'<sup>443</sup>.

Like Equity, the trust offers stakeholders a fetish insofar as it enables the stakeholder to believe in the promise made by capitalism for unencumbered wealth creation that will satisfy their unmet desires<sup>444</sup>. In that sense, trusts, in accordance with the fantasies promulgated by capitalism in order to maintain stakeholder investment and engagement, depend 'on the idea of obtaining the object'<sup>445</sup>. And fetishization is, therefore, perhaps the most effective explanation of the ability of stakeholders to consistently use trusts for morally questionable ends without, in effect, being comprehensively morally comprised at the political and social level. Trusts assume a wide variety of forms, especially in contemporary use within commercial capitalist settings. As Lord Browne-Wilkinson maintains in *Target Holdings Ltd v Redferns* [1996] AC 421: 'In the modern world the trust has become a valuable device in commercial and financial dealings', and, indeed, this led

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<sup>440</sup> Stebbings, 2002, p.128

<sup>441</sup> Christensen, 2015, p.137

<sup>442</sup> Cotterrell, 1987, p.87

<sup>443</sup> Hudson, 2017, p.66

<sup>444</sup> Unencumbered in this context could relate, for example, to the use of trusts to avoid or diminish certain tax obligations and thus help increase the net worth of the stakeholder. The use of trusts by individuals and corporations alike to aggressively manage their tax affairs is one of the most significant uses of the trust under contemporary capitalism. See for example: Nicholas Shaxson. 2011. *Treasure Islands: Tax Havens and the Men Who Stole the World*. London: Vintage; and Harrington, 2016.

<sup>445</sup> McGowan, 2013, p.60

his reasoning to demand that the nuances of commercial trusts be recognised and differentiated from that of so-called 'traditional trusts'<sup>446</sup>. At a fundamental level, a trust offers a 'unique way of owning property under which assets are held by a trustee for the benefit of another person, or for certain purposes, in accordance with special equitable obligations'<sup>447</sup>. Importantly, however, trusts offer 'versatility' to the domain of private property that other legal mechanisms do not, and this applies in commercial and non-commercial contexts alike as Jonathan Garton explains:

The secret of the trust's success is to be found in three things. First, in establishing a trust, a founder (or a court, in the case of 'imputed trusts') can play a whole range of 'tricks' with three particular aspects of property ownership: nominal title, benefit and control. The founder (or the court) can juggle these around in a variety of ways. Second, the rights and obligations expressly created in a trust are fortified by effective remedies and supplemented, so far as is necessary, by a substratum of detailed legal rules. Third, in the areas where it is predominately used, the trust performs its 'tricks' with property better, and has stronger legal reinforcement, than other competing legal institutions<sup>448</sup>.

It is no mystery I suggest that trusts are a crucial weapon in the capitalist stakeholder arsenal because of their ability, not least via the 'tricks' Garton talks of, to increase private power through secreted wealth and capital holdings. In a robust argument regarding

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<sup>446</sup> [1996] AC 421 at 435 – 'The fundamental principles of equity apply as much to such trusts as they do to the traditional trusts in relation to which those principles were originally formulated. But in my judgment it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind'.

<sup>447</sup> Watt, 2014, p.18

<sup>448</sup> Garton, 2015, p.5

trusts and capitalism, Mitchell Franklin, in his reference during the 1930s to the Anglo-American capitalist deployment of trusts, asked:

What is the significance of the dominant role of the trust in Anglo-American juridical theory? Why is it that the jurists, who have jeered at the spectacle of parallel systems of law, in which "equity" is expected to contradict "law", and in which there is a hierarchy of courts with the "equity" courts holding rank of the first class and the "law" courts holding rank of the second class (though the same judge may now play both roles at once), have refrained from liquidating the trust? Why has the trust survived repeated legislative assault except when the fisc [*sic*] is harassed?

The answers come when the role of trusts under the regime of liberal capitalism is understood. The trust is an effort to escape from the ever-deepening and ever-recurrent crises in capitalism. It is the confession of the upper middle class - the class that has most used the trust - that the contradictions in capitalism cannot be resolved. The risks of capitalism, therefore, must be minimized as much as possible through the employ of an astute, intelligent, ever-watchful class of professional managers of capital who are placed, because they are *élite*, beyond the control of the owner for consumption. But American lawyers do not have to be reminded that capitalism is so sick that even this device to protect the only class that benefits from capitalism has failed pathetically<sup>449</sup>.

The global significance and popularity of trusts within capitalism as Franklin described them has not disappeared in the years since he was writing. Instead, they have become

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<sup>449</sup> Mitchell Franklin. 1934. Book Reviews. *Tulane Law Review*, Vol. 8, No. 3 (April), p.475

more pervasive because, I argue, at a fundamental psychological level they offer a reassuring promise to stakeholders that they will be brought nearer to obtaining *the* object of desire. But as psychoanalysis routinely tells us the object can never be obtained and the fantasies and illusions of fetishism are testaments to the ways in which stakeholders (subjects) manage this reality. Far from discouraging the stakeholder, the fantasy acts as a primary motivation unleashing myriad ways in which it is believed the object might be obtained. This notion returns us to the fundamental 'creativity' attributed to Equity mentioned earlier, whereby approaches to rights and ownership that have allowed private property to remain vital to wealth generation are symptomatic of Equity's contribution to the governance and administration of the private property order<sup>450</sup>. To echo Franklin, 'professional trustees, the habitual managers of capital, especially as they have been used in the states where the middle class is most class conscious, enjoy a role of the highest importance under capitalism: they are the *Fuehrers* of liberal capitalism'<sup>451</sup>. As such, trusts provide an attractive proposition for stakeholders in search of proprietary and personal rights, to secure assets, and to generate wealth – a conjunction and causality of factors underscored by the desire for the lost object. In order to further describe how Equity manipulates the property concept to these ends, security interests and charges offer instructive examples in addition to trusts.

Charges are forms of security that only take effect in Equity and grant the 'secured party some right by virtue of the parties' contract to sell the assets provided by way of a security, whether that property is held at the time of the creation of charge or whether it is only capable of first coming into existence once the specific property comes into the

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<sup>450</sup> 'Equity', Sarah Worthington explains, 'took a 'bundle of rights' already regarded by Common Law as 'proprietary' and divided the bundle between two or more people so that the interests of each were still significant enough to be regarded as proprietary' (Worthington, 2006, p.63)

<sup>451</sup> Franklin, 1934, p.475



hands of the chargor'<sup>452</sup>. As such, Equity creates a new form of proprietary interest 'that is quite distinct from ownership or possession', by demarcating certain rights for secondary parties over property legally owned by another<sup>453</sup>. Equity 'took a personal obligation that related to property', such as a contractual obligation to discharge a debt, 'insisted it was specifically enforceable, and then protected the right against interference by strangers', namely other secured (and unsecured) creditors<sup>454</sup>. A key and 'outstanding' feature of Equity's intervention is therefore temporal, as it creates proprietary rights in *future* interests where the Common Law does not<sup>455</sup>. In Equity, as Beale *et al* state, a debtor is able to 'raise finance on the basis of an ever-changing asset base such as present and future book debts'<sup>456</sup>.

Equity has fostered a crucial role for itself in modern finance and commerce by making charges and associated future interests in intangible assets highly prized commercial entities that circulate via special purpose vehicles ("SPVs"). In contemporary liberal financialised and commercialised societies where a vast majority of activity, whether domestic or multinational, is defined by a constant tension between debt and credit, demands for safeguards to prevent financial loss and mitigate unjust claims are commonplace. What is more, the ability of one party to confidently transfer property and the bundle of rights over it to another party on credit, thus effectively replacing the immediate discharge of a debt in favour of an obligation to do so at a later date is, arguably, and at least on a par with trusts as an engine of wealth and desire.

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<sup>452</sup> *Re Coslett Contractors Ltd* [1998] Ch 495; and Alastair Hudson. 2013. *The Law of Finance*. 2<sup>nd</sup> Edition. London: Sweet & Maxwell, pp.653-654

<sup>453</sup> Worthington, 2006, p.78

<sup>454</sup> Worthington, 2006, p.78

<sup>455</sup> Hugh Beale, Michael Bridge, Louise Gullifer and Eva Lomnicka. 2012. *The Law of Security and Title Based Financing*. 2<sup>nd</sup> Edition. Oxford: Oxford University Press, p.8

<sup>456</sup> Beale *et al*, 2012, p.8

By 'hiving off' certain rights from property's overall bundle Equity not only introduces flexibility into property law, but also reveals how a veritable matryoshka doll of different interests (of property within property within property) can emerge to be freely traded and thus generate wealth often many times in excess of the initial value of any single asset. This form of pure use (trade, transfer and profiteering), where the right of exclusion is only really a concern for a chargor in so far as it facilitates and guarantees further profitable use - onward transferability of assets, for example, as in forcing the sale of property that is subject to a charge and where the debt has failed to be discharged - complicates the notion that exclusion, as described earlier in this chapter, is nevertheless fundamental to understanding stakeholder reliance on private property in contemporary capitalist society<sup>457</sup>.

## 4. Conclusion

Over the course of the last two hundred years, capitalism and the growth in competitive free-markets has accelerated exclusion, exclusivity and demands for private property alongside the self-interest of economic and legal subjects who are defined by and seek narcissistic self-definition in portfolios of property holdings and the wealth and capital gains they produce. It has placed a significant onus on Equity to preside over ever more private domains that are both domestic and commercial, and *abstract value* that is

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<sup>457</sup> Penner, for example, argues that: 'the law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use. In other words, in order to understand property, we must look to the way that the law contours the duties it imposes on people to exclude themselves from the property of others, rather than regarding the law as instituting a series of positive liberties or powers to use particular things' (Penner, 1997, p.71). The argument made here is that the forms of property created by Equity that service wealth creation in the financial and commercial sectors, in contrast to Penner's claim, are absolutely the preserve of positive liberties to use the property of or in another, especially where this guarantees a profit. While rules and regulation exist that prevents arbitrary interference with the property of another where that property is subject to a charge, including those covered under the *Law of Property Act 1925*, thus mitigating unencumbered profiteering to some extent, this still not does amount to exclusion overriding use as the way to understand property, at least not in today's society.

increasingly divorced from any tangible or material counterpart in order to ensure, to echo Maitland, the fruitfulness of those private domains.

The profound influence vouchsafed by capitalism to Equity's various mechanisms such as trusts and securities has been predicated on the need to force a shift in emphasis from a particular material asset held at any one time, feudal land for example, to the abstract value of what is owned. Freed from constraints of material holdings and also of the responsibilities, obligations and duties that accompany property stewardship and management, trusts and securities have been particularly effective in providing far-reaching benefits and gains for stakeholders whose conscious concern is for the most efficient maintenance of the 'value which presently held trust assets represent', whilst unconsciously enjoying the opportunity that greater levels of property give them to escape the traumatic truth of their castrated subjectivity<sup>458</sup>.

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<sup>458</sup> Cotterrell, 1987, p.85

# Chapter 5

## *A Different Theory of Civil Justice: Setting the Scene*

*We are justified in speaking of a commodity-orientated ideology, or, as Marx called it, 'commodity fetishism', and in classing this phenomenon as a psychological one. What we need to establish, therefore, is not whether general juridical concepts can be incorporated into ideological processes and ideological systems – there is no argument about this – but whether or not social reality, which is to certain extent mystified and veiled, can be discovered by means of these concepts<sup>459</sup>.*

### 1. An introduction to Equity fetishism

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'Equity in Law, is the same that the Spirit is in Religion, what everyone pleases to make of it' said John Selden in his *Table Talk* published in the sixteenth century<sup>460</sup>. Selden's description points to a certain truth that concerns the slipperiness of Equity. The heterogeneity of legal contexts that Equity works across and through make it disorientating and hard to define<sup>461</sup>. It is, by turns, interpreted as fixed and flexible, wide and narrow, objective and subjective<sup>462</sup>. Equity's impact upon the many legal domains on to which it is projected occurs through an incorporation and subsequent radiation of meanings and powers ascribed to it, whereby it is said to extend the general Law by a 'process of deduction from existing principle'<sup>463</sup>. As we have seen, Equity is applied flexibly and reflexively in a variety of legal contexts in order to address perceived conceptual, systemic or experiential inequities and inequalities that stem from overly

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<sup>459</sup> Pashukanis, 1989, pp.73-74

<sup>460</sup> John Selden. 1856. *Table Talk of John Selden*. London: J.R. Smith [Online] Available at <https://archive.org/details/tabletalkofjohns00seldiala> (accessed 9th January 2017), p.49

<sup>461</sup> 'Equity can be described but not defined' - Meagher *et al*, 1992, p.3.

F.W. Maitland comes to a similar albeit somewhat less confident conclusion: 'in no general terms can we describe either the field of equity or the distinctive character of equitable rules. Of course, we can make a catalogue of equitable rules, and we can sometimes point to an institution, such as the trust strictly so called, which is purely equitable, but we can make no generalization'. (Maitland, 1969, pp.13-14)

<sup>462</sup> Jill E. Martin. 2012. *Modern Equity*. 19th Edition. London: Sweet & Maxwell, p.3

<sup>463</sup> Margaret Halliwell. 2004. *Equity and Good Conscience*. 2<sup>nd</sup> Edition. London: Old Bailey Press, p.150

formal rule compliance. This involves, for instance, an application of Equity's jurisprudence that begins with questions of what is just and fair.

Central to this view of Equity is what Simon Chesterman has called, 'the recurrent theme of unconscionability', which has long been instrumental in shaping the nature of Equity's intellectual development and application in practice, as discussed in Chapter 4<sup>464</sup>. From the point of view of civil justice, unconscionability assumes something of a universal and unifying form<sup>465</sup>. It does so in dialogue with a 'problematic of judicial decision-making (the necessarily impossible demand to *do justice*)' that occurs within the interrelated domains of *private* and *property* law<sup>466</sup>. This is a condition underscored by Equity's liberalization of legal principles and maxims, rules and doctrines that operate in the main to support the private property order<sup>467</sup>. That is, I argue, a socioeconomic order predicated on the vindication of property rights as a basis for ownership and certainty of title that not only relates to the interest of individual stakeholders but is crucial for the survival of capitalist ideology and capitalism as a mode of social organization. Marx claimed that capitalism 'begins by seeming to acknowledge man (his independence, spontaneity, etc.); then, locating private property in man's own being, it can no longer be conditioned by the local, national or other *characteristics of private property* as of *something existing outside itself*. This political economy, consequently, displays a *cosmopolitan*, universal energy which overthrows every restriction and bond so as to establish itself instead as the *sole* politics, the sole universality, the sole limit, the sole bond'<sup>468</sup>. As a concurrent body of law alongside the Common Law and a keystone of civil

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<sup>464</sup> Chesterman, 1997, p.351

<sup>465</sup> Lord Walker in *Cobbe v Yeoman's Row Management Ltd and another* [2008] 1 WLR 1752 at 92

<sup>466</sup> Chesterman, 1997, p.358

<sup>467</sup> Virgo, 2012, pp.26-39

<sup>468</sup> Karl Marx. 1975. Third Manuscript: Private Property and Labour. Political Economy as a Product of the Movement of private Property, in, Karl Marx and Frederick Engels. 1975. *Collected Works, Volume 3 1843-1844*. London: Lawrence & Wishart, p.291

justice with regard to property, Equity is demonstrably political on Marx's terms, and thus forms a significant part of what Louis Althusser calls the 'legal ISA' (ideological state apparatus)<sup>469</sup>.

It is important to realise that the influence of private actors and those in the field of business and finance, in particular, alters ideology in this regard. Whilst the civil justice of which Equity forms a part is definitively an entity of the State (and part of a political unity in public services at any one given moment in time, normatively a term of government), the private actors whose influence on the system is transformative points less to State ideology than the ideology of powerful private economic interests. This is perhaps unsurprising given the trend in State ideology since at least the nineteenth century in supporting economic growth, reason and expedience in ways that do not diverge from capitalist ideology as it exists in the private domain but shadow it. The civil justice system, like all or many other State entities, is drawn along the lines of a logic of production and economy characterized, as André Gorz has argued, 'by the desire to *economize*' and 'use the factors of production as efficiently as possible'<sup>470</sup>. State ideology is in that sense always already the ideology of private interests. Fetishism in the context of ECJ is complex and variegated because it involves real-world effects that manifest through practices of economic reason and the implementation of capitalist ideology through civil justice, thus making it a mode of production. This is a point of view that Gary Watt acknowledges to some degree when he says that '[i]t is true that economic language has embraced the idea of equity almost to the point of suffocating it'<sup>471</sup>. Although Watt remains optimistic that 'it is within our power to loosen its grip'<sup>472</sup>.

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<sup>469</sup> Althusser, 2008, p.17

<sup>470</sup> André Gorz. 1989. *Critique of Economic Reason*. London: Verso, pp.2-3

<sup>471</sup> Watt, 2012, p.37

<sup>472</sup> Watt, 2012, p.37

At heart, Equity fetishism is, as the earlier discussion on Bentham also implied, a product of psychological affect and a mode of subjection 'concerned with the relation between practices and a symbolic order constituted within history'<sup>473</sup>. This makes it a psychological mechanism through which economic subjects sustain belief in the certainty and completeness, that is, an uncastrated and un-lacking nature, of civil justice *within* the confines of the capitalist superstructure. This belief from within the ambit of capitalist ideology insists that '[w]ithout Equity, the common law would be an incomplete means to achieve justice'<sup>474</sup>. The clear influence of political economy and economic reason in this instance prompts the need to consider a particular formulation of fetishism able to account for that influence. It is suggested here that, with roots in the property basis of civil justice Equity fetishism brings together the political and economic considerations of commodity fetishism under capitalism, and the fetishism related to the fantasies and desires for complete justice also promulgated under capitalism. In order to reconcile these two positions requires, I claim, a discussion of the relationship between Marx and Freud's theories of fetishism, a discussion that will follow later in this chapter.

In the fantasy life of stakeholders, Equity fetishism does not exist magically or transcendently so much as institutionally, systemically, bureaucratically and thus somewhat prosaically. Equity is rarely if ever spectacular in the sense that it encourages any radical or serious refinement of the law, where the ramifications of such refinements would be felt at the very core of the economic base or the very heart of capitalist ideology. Neither is Equity uncertain by any normative economic definition of the term. Rather,

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<sup>473</sup> Étienne Balibar. 2017. *The Philosophy of Marx*. Translated by Chris Turner. London: Verso, p.72

<sup>474</sup> Lord Neuberger of Abbotsbury, Master of the Rolls. 2010. Has Equity Had Its Day? *Hong Kong University Common Law Lecture 2010*. 12 October 2010. Hong Kong. [Online] Available at: <http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-hong-kong-lecture-12102010.pdf> (accessed 24 April 2017), p.1

Equity's jurisprudence and its status as a means of complete justice rely on inflexions of conscience and a syntax of fairness that contributes to a particular distribution of economic power that benefits those able 'to shape the rule of law to provide a framework within which they can exploit others'<sup>475</sup>.

Instrumental to the implementation and practice of economic reason, Equity can, to some degree, still be understood in terms of a legacy of practical reason traceable to the pre-capitalist notion of *sinderesis*, that Piyel Haldar maintains in its early modern form 'was elaborated both by theologians and by jurists [...] the spark of conscience (*scintilla conscientiae*) given to and shared by each individual rational creature'<sup>476</sup>. Yet, the net effect of capitalist ideology and economic reason has not been to celebrate or promote this legacy of Equity in law. Nor to use it as a truly effective way of addressing distortions in the economy fostered by advocates of legal frameworks who claim to be promoting an efficient economy<sup>477</sup>. Instead, any potential threat felt by the capitalist class towards their interests relating to uncertainty engendered by Equity and crystallized in the notion and practice of conscience has been reconfigured, as we will see in the later chapters of this thesis, by that same power in order to mask and conceal a reality of social relations<sup>478</sup>.

## 2. The language of Equity

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In his mission to classify the whole of the law as means to greater certainty, the late Peter Birks focused intently on the failure of language to properly describe what it was the law was either doing or expected to do<sup>479</sup>. Central to his critique was Equity and the

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<sup>475</sup> Stiglitz, 2013, p.238

<sup>476</sup> Piyel Haldar. 2016. Equity as a Question of Decorum and Manners: Conscience as Vision. *Pólemos*, Vol. 10. Issue 2 (September), p.313

<sup>477</sup> Stiglitz, 2013, p.235

<sup>478</sup> Including the reality of power relations as a core of the property form and the fact that property always 'articulates a political relationship between persons', where capitalism would rather and does insist *ex cathedra* on the illusion of property as mere cold dead *things*' (Gray and Gray, 2009, p.88)

<sup>479</sup> Birks, 1996



vocabulary and language associated with it, including fairness, justice or what is construed as just, unconscionability and definitive elements of fiduciary law<sup>480</sup>. For Birks this language is, on the whole, 'so unspecific' it simply conceals 'a private and intuitive evaluation', and the difficulty with fiduciary law 'is that its meaning has been allowed to become completely uncertain'<sup>481</sup>. Yet, as a discrete jurisprudence and a mode of practice and reasoning, historical portraits of Equity paint it as a site for the reconciliation of antagonistic concepts found at the intersection of the objective and subjective struggle over justice, and as such has relied on the language Birks dislikes<sup>482</sup>. As suggested earlier, in order to fully understand what Equity is expected to achieve in the capitalist civil justice system it is necessary to unpack what it means for the justice that Equity represents to be *complete*. To do this requires an analysis of the function of Equity's language and how it is used to construct the notion of complete justice in, for example, case-law judgments, as well as in the form of individual principles, doctrines and rules of practice and procedure, such as those explored in Chapter 4<sup>483</sup>.

There is no material form of Equity able to perform the role of ritual object, talisman or amulet *qua* fetish. But language can serve this purpose by providing an anchor of meaning for the subject, whether subtle or specific, which in turn is able to motivate demand and desire. For instance, at the level of interpellated economic subjects and their relationship with property, Equity promises to provide a solution to the stakeholder's problem of what is *fair* (albeit a response which in itself may not be a fair one) or *just*

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<sup>480</sup> Birks, 1996, pp.16-17

<sup>481</sup> Birks, 1996, p.17

<sup>482</sup> This is, in part, the view Aristotle expressed on Equity when he claimed the nature of Equity to be 'a correction of law where it is defective owing to its universality' (Aristotle, 2009, p.99). Throughout this thesis, notably in the previous chapters regarding the history of Equity, are a wide variety of examples of the use of terms such fair and just, and therefore they do not need to be restated here in order to support this statement.

<sup>483</sup> The principles, doctrines and rules referred to will not be recounted again at length here. The aim of Chapter 4 was to establish them as a foundation for the present analysis.

with regard to the means of and necessity to create proprietary and personal rights from what Virgo calls 'particular events'<sup>484</sup>. Unconscionability, the long-standing doctrine at the heart of the notion of Equity is especially important when it comes to shaping narratives surrounding ECJ and thus to establishing it as a fetish. In the framework of Equity fetishism, unconscionability creates an important veil of belief behind which the subject confidently conceals the fallacy of complete justice in particular and the fact that 'no object is whole or fulfilling for the subject' in general<sup>485</sup>. Or, as Birks argues, in order to conceal the presence, prevalence, and problematic of 'private and intuitive evaluation'<sup>486</sup>. Whilst Equity may be encountered through particular and sometimes visceral juridical gestures (the constraint of an agent subject to a fiduciary obligation for example), or through decorum or manners as Haldar has suggested, it is both as a body of juridical texts that are applied and an object of desire in the field of adjudication that is identified and named in and through other juridical texts that establish the specific form that Equity fetishism ultimately takes.

That the language of Equity (or any language for that matter) does not amount to all it promises the subject is revealed in Freud's belief that 'unconscious mental disturbances produced symptomatic linguistic *formations or deformations*' [my emphasis]<sup>487</sup>. In other words, the use of language and its application in a given situation is accompanied by a degree of 'turbulence, disorder, or misalignment'<sup>488</sup>. 'Equity' is never just 'Equity, but is always already unsatisfactorily defined by a growing series or chain of other signs that betray 'the subsurface burbling of psychic disturbances'<sup>489</sup>. The subject who comes to the

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<sup>484</sup> Virgo, 2012, p.19

<sup>485</sup> McGowan, 2016, p.24

<sup>486</sup> Birks, 1996, p.17

<sup>487</sup> Geoffrey Galt Harpham. 2002. *Language Alone: The Critical Fetish of Modernity*. London: Routledge, p.175

<sup>488</sup> Harpham, 2002, p.175

<sup>489</sup> Harpham, 2002, p.175

civil justice system is, therefore, always confronted by language as a precursor to action (a judgement or order for instance); language that is 'caught in a system of assemblage and separation, in a code'<sup>490</sup>. But, Baudrillard concludes, '[c]ircumscribed in this way, they [the fetish] become the possible objects of security giving worship'<sup>491</sup>. What first appears as the apparent disorder of a resolutely indefinable 'Equity' (a series of signs to nowhere) therefore, is, in fact, a crucial element of Equity fetishism, because language is necessary to create the gap-filling, fetishized object validated and legitimized at the moment of enunciation and adjudication of civil justice.

The divergent language basis to Equity fetishism is particularly noteworthy in portraits that paint Equity as a spectacular, rarefied or an extraordinary mode of justice, morality or conscience capable of transcending the harsh if somewhat banal and normative functions of Law (as justice *beyond* the law). This fetishization is rooted in the subject knowing that Equity as 'the word' on justice is not 'the thing itself', yet persisting in 'ignoring this knowledge' and doing so through recourse to a litany of other words, fairness, equality and so on, which appear to represent Equity but are in fact chains of signs that lead nowhere<sup>492</sup>. Jacques Lacan's assertion of 'a locus in which language questions us as to its very nature' is thus instructive on the matter of what I referred to previously as Equity's *slipperiness*<sup>493</sup>.

'[N]o signification can be sustained other than by reference to another signification', claims Lacan, and 'in its extreme form this amounts to the proposition that there is no language (*langue*) in existence for which there is any question of its inability to cover the

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<sup>490</sup> Baudrillard, 1981, p.95

<sup>491</sup> Baudrillard, 1981, p.95

<sup>492</sup> Aristodemou, 2014, pp.23-24

<sup>493</sup> Jacques Lacan. 2001. Agency of the Letter in the Unconscious, in *Écrits: a selection*. Translated by Alan Sheridan. London: Routledge Classics, p.166

whole field of the signified'<sup>494</sup>. Further, '[i]f we try to grasp in language the constitution of the object [the *thing*], we cannot fail to notice that this constitution is to be found only at the level of concept' [my addition]<sup>495</sup>. This last point is particularly relevant in terms of understanding Equity fetishism because it points to an interpretation of the slipperiness of Equity that, I argue, actually supports rather than undermines fetishization<sup>496</sup>. In the context of fiduciaries, Birks, for example, insists that 'we ought to recognise that the language of fiduciary relationships and obligations is wholly unsatisfactory', but he errs on Lacan's account by further insisting that is essential 'to find other words to *denote with precision* the different things which in different contexts the overworked fiduciary language has been trying to denote' [emphasis added]<sup>497</sup>. In attempting to 'grasp' Equity or its associated mechanisms as Birks suggests via fiduciaries as a particular *thing*, Lacan argues that it will and does inevitably break up into myriad other signs, which inevitably result in vagueness, as fairness, equality, justice and so on. *Contra* Birks' insistence that failed attempts for law to counteract the vagueness of terms such just, and fair, and unconscionable or to suitably and accurately denote fiduciaries can be remedied, language is always indeterminate when it comes to signifying and representing the subject or object - it is not possible, for instance, that complete justice be *complete* or *completed* as such in or by language. More or different language, as Birks argues, cannot change this. More or different language instead provides new openings for the stakeholder to exercise lack of satisfaction in the *thing* offered to them, and an

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<sup>494</sup> Lacan, 2001, p.165

<sup>495</sup> Lacan, 2001, p.165

<sup>496</sup> Whilst Lacan provides an interpretation of fetishism that is certainly instructive to this thesis, Freud and to a lesser extent Marx remain the major sources of a formulation of the concept discussed throughout. Lacan's influence on this thesis, as the discussion at present reveals, concerns language and in particular the language of Equity and ECJ and the role it plays in understanding castration as the requirement for entrance into society.

<sup>497</sup> Birks, 1996, p.18

opportunity to (continue to) demand and desire when satisfaction does not materialize or come.

Instead of language signalling an end to Equity as a fetish due to a lack of linguistic coherence, however, two possible forms of fetishism occur in order for the subject to sustain belief in the authority and legitimacy of ECJ. Firstly, there is fetishism of the very lack of coherence itself, in the form of new constitutions of language that recycle the defiance of incoherence and uncertainty. We can see this sort of fetishism, for example, in Gary Watt's claim that, '[i]t is in some respects easier to know what equity is not, than to know what equity is'<sup>498</sup>. Secondly, although related to the first, is fetishism indexed to an initial neurotic vindication of ECJ by the legal community as purveyors of expertise, knowledge and meaning (judges, lawyers, legal academics, and so on). This neuroticism, born of the need to stave off the frustrations of uncertainty within capitalist civilisation by defining limits and constraints in law on forms of economic existence, is displayed in Birks' project of taxonomy, Bentham's *pannomion*, and Posner's reduction of the law to the calculable logic of economics, all of which work hand-in-hand with the perverse insistence of stakeholders in the lost object-locating potentialities of civil justice within capitalism<sup>499</sup>.

At its most basic this form of fetishism turns on Lacan's notion as highlighted above that, faced with the failure of language to grasp the object, the constitution of the *thing* can only reside at the level of concept. There is, therefore, a professional process of *conceptualisation* which produces and vindicates a particular concept *qua* fetish. Hence

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<sup>498</sup> Watt, 2012, p.39

<sup>499</sup> 'It was discovered that a person becomes neurotic', claims Freud, 'because he cannot tolerate the amount of frustration which society imposes on him in the service of its cultural ideals, and it was inferred from this that the abolition or reduction of those demands would result in a return to possibilities of happiness' (2001, p.87)

the notion of complete justice relies on an initial neurotic conceptualisation by the legal community prior to stakeholder inference in order not only to subsequently produce but also legitimize and vindicate the fetish. As I claimed a moment ago, Birks offered a particular example of this neurotic conceptualisation with his project of legal taxonomy<sup>500</sup>. 'One advantage of a good classification is that it keeps all relevant possibilities in view and reduces the risk that one might be overlooked', claimed Birks, moreover that 'it militates against the tricks that complex language can play in concealing similarities and unnecessarily proliferating entities'<sup>501</sup>. This strict observance of the proper place and definition of law was not for everyone Birks claims, however, it can do nothing 'for an observer who lacks the exacting taxonomic mentality' and that, for example, the 'lawyer who deals with 'unconscionable behaviour' is rather like the ornithologist who is content with 'small brown bird'<sup>502</sup>.

As neurotics the legal community aim to justify and defend legal expertise though language and knowledge that possesses discrete value and, following Birks, levels of categorical accuracy befitting internal and external (economic) demands for certainty, especially demands that have commercial and financial consequences. As Millett robustly maintained: 'Businessmen need speed and certainty; these do not permit a detailed and leisurely examination of the parties' conduct. Commerce needs the kind of bright-line rules which the common law provides and which equity abhors'<sup>503</sup>. Graham Virgo's

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<sup>500</sup> Birks, 1996; Peter Birks. 2005. *Unjust Enrichment*. 2<sup>nd</sup> Edition. Oxford: Oxford University Press

<sup>501</sup> Birks, 1996, p.16

<sup>502</sup> Birks, 1996, p.16

<sup>503</sup> Millett, 1998, p.214

insistence on the role fiduciaries play in, what he calls, the cynicism of Equity, is yet another example<sup>504</sup>.

It would be wrong to say that the sorts of concepts discussed above, in spite of their lack of concreteness in language, do not have real-world effects. The language (if not precisely the knowledge) of Equity is, after all, inferred and appropriated at the superficial yet potent level of the concept by a wide community of stakeholders for whom the concepts the language describe a means to leverage new economic events and commercial opportunities that have real-world consequences, both good and bad. As such it can be argued that the 'concept' in question here is not ethereal nor has it ever been, even during the earlier periods of Equity's history. Narratives on the nature of Equity from the likes of Sir Henry Maine and F.W. Maitland highlight the influence of ecclesiastical (Roman Catholic) thought and practice on Equity jurisprudence that returns though concepts relating to a language of conscience, most notably in the doctrine of unconscionability. Insofar as these concepts and language feature as a basis for judicial reason and thus inform the implementation of complete justice, as well as, for example, the application of remedies that have real-world effects, it is hard to see them entirely lacking material constitution<sup>505</sup>. In other words, the apparent conceptual concreteness of unconscionability can be evidenced by numerous judgments that have applied the doctrine (in spite of Birks' fervent dislike of the term and the problematic of intuition it encapsulates) and produced material effects at some discernible level in the world – the reversal of an unjust enrichment for instance, and its impact on parties to a commercial

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<sup>504</sup> Virgo, 2012, p.35 - 'Equity requires the highest standards of fiduciaries because of fears that people occupying such positions of trust and confidence may be tempted to prefer their own interests over those of their principals. It is for this reason that a fiduciary who makes any profit from their relationship will be liable to disgorge it to the principal, even if this was part of a transaction that was for the benefit of the principal'.

<sup>505</sup> There is a notable parallel here with Pierre Teilhard de Chardin's particular notion of Christian faith as '*an operative power*', and 'that the efficacy of prayer is tangible and certain' (Chardin, 1964, p.135)

transaction<sup>506</sup>. This suggests the production of an object or *thing* that can be more readily fetishized than reference to a concept alone<sup>507</sup>.

‘Without good taxonomy and a vigorous taxonomic debate’, argues Birks, ‘the law loses its rational integrity’<sup>508</sup>. And in order for rationality to prevail expertise within the law, of the lawyer, the judge, the academic, must seize language and direct it to the thing as such, they must consent Birks’s claims ‘to be prisoners of their own expertise’<sup>509</sup>. Further, it is ‘essential to come to the law armed with a belief in the fallibility of intuition and a consequent aversion to all forms of thought and expression which are no more than vehicles of the gut reaction’ and that ‘a sophisticated modern legal system should in general regard direct appeals to ‘justice and good conscience’ and ‘large principles of equity’ with deep suspicion’<sup>510</sup>. I argue, however, that Birks’ proposal does not (or could not) solve the problem he names, but instead drives the type of neuroticism within legal thinking that focuses on, at least with regard to Equity, the strange conjunction of flexibility and certainty articulated through language as the only valid and rational end point of law. Gabel and Feinman, in their assessment of an analogous relationship between contract and ideology, state that ‘[m]ost of the time the socioeconomic system operates without any need for law as such because people at every level have been imbued with its inevitability and necessity. When the system breaks down and conflicts arise, a legal case comes into being. This is the ‘moment’ of legal ideology, the moment at which lawyers and judges, in *their* narrow, functional roles seek to justify the normal functioning of the system by resolving the conflict through an idealized way of thinking

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<sup>506</sup> See, for example Lord Scarman in the Privy Council case, *Pao On v Lau Yiu Long* [1980] AC 614

<sup>507</sup> See for example: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 705 where Lord Browne-Wilkinson noted that ‘Equity operates on the conscience of the owner of the legal interest’.

<sup>508</sup> Birks, 1996, p.22

<sup>509</sup> Birks, 1996, p.22

<sup>510</sup> Birks, 1996, pp.22-23



about it'<sup>511</sup>. Yet actual closure or resolution of the problem presented to law in and with language is not possible. On the terms discussed here, language is instead redirected towards the construction of fantasies around the constant (re)conceptualizing of legal expertise, which, I claim occurs within capitalism on behalf of stakeholders as part of the broader perfectibility demanded by economic reason. Law in that sense aids economic reason in constructing and maintaining fetishized frameworks of civil justice.

### 3. Freud with Marx

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'To this enlightened political economy, which has discovered – within private property – the *subjective essence* of wealth', claims Marx, 'the adherents of the monetary and mercantile system, who look upon private property *only as an objective* substance confronting men, seem therefore to be *fetishists*'<sup>512</sup>. Equity constitutes a type of stakeholder fetishism that, I have argued, begins in the private property order. Equity fetishism is not simply commodity fetishism, however, but a perverse compliment to it. It is a form of fetishism that always returns to a specific unconscious desire for complete justice as a means of avoiding castration, which reflects the structure and meaning of the various rules, doctrines and principles that comprise Equity's jurisprudence and its contribution to civil justice. Accordingly, neither Marx nor Freud's concepts of fetishism alone are sufficient, but argumentation that is built around both. It is important at this stage therefore to provide a rationale for conjoining the theories of Freud and Marx, and in particular how together they underpin the concept of Equity fetishism.

Fetishism generally describes a psychological effect and a mode of subjection 'concerned with the relation between practices and a symbolic order constituted within history',

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<sup>511</sup> Peter Gabel and Jay Feinman. 1998. Contract Law as Ideology, in, *The Politics of Law: A Progressive Critique*. 3<sup>rd</sup> Edition. Edited by David Kairys. New York: Basic Books, p.508

<sup>512</sup> Marx, 1975, p.290

where those practices and that symbolic order describe the conduct of civil justice within capitalism<sup>513</sup>. This definition is important because it goes a long way to reconciling the historical materialism of Marx, which views social existence as the determinant of the subject's consciousness, with Freud's notion of castration as key to the subject's place within the symbolic realm of social existence. Locating this dual definition of fetishism in the context of Equity fetishism reveals it as a psychological mechanism through which the stakeholder sustains a belief in the certainty and completeness - that is, the uncastrated and un-lacking nature - of civil justice within capitalism. Whilst Freud tells us that a subject sustains belief due to unconscious desires, Marx's historical materialism brings to light essential details relating to belief determined by the political economy of capitalism and, latterly, neoliberal capitalism.

Freud's work on fetishism from 1927 onwards forms the larger part of the consideration of fetishism here. But, and somewhat contrary to the idea that at a theoretical level Freud prefigures Marx, his concept of fetishism will be drawn initially from Marx's earlier use of the concept in relation to commodities. To be clear, therefore, I claim that Equity fetishism brings together the political and economic considerations of commodity fetishism under capitalism, and the psychological fetishism related to the fantasies and desires for complete justice promulgated by capitalism. Freud in this instance, broadly speaking, picks up strands of Marx and develops them in accordance with psychology, rather than a material or politico-economic understanding of social relations. Slavoj Žižek maintains that 'in Marxism a fetish conceals the positive network of social relations, whereas in Freud a fetish conceals the lack ('castration') around which the symbolic network is articulated'<sup>514</sup>. The two interpretations are, therefore, not irreconcilable and

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<sup>513</sup> Balibar, 2017, p.72

<sup>514</sup> Slavoj Žižek. 1989. *The Sublime Object of Ideology*. London: Verso, p.50

in Equity fetishism there is a site in which it is possible to describe how they come together in what is yet another point of *fusion*<sup>515</sup>. The notion of concealment, in particular, helps reconcile fetishism in Marx and Freud. Georg Lukács, as the following passage demonstrates, is instructive in this regard:

The fetishistic illusions enveloping all phenomena in capitalist society succeed in concealing reality, but more is concealed than the historical, i.e. transitory, ephemeral nature of phenomena. *This* concealment is made possible by the fact that in capitalist society man's environment, and especially the categories of economics, appear to him immediately and necessarily in forms of objectivity which conceal the fact that they are the categories of the *relations of men with each other*. Instead, they appear as things and the relations of things with each other<sup>516</sup>.

For Lukács, economics play an important role in masking the reality of social relations under capitalism. This notion is one accepted by this thesis but not an accusation reserved for economics alone. Rather, it is argued that ECJ, and arguably by virtue of the conjunction of law and economics it represents, performs a complimentary role both as an extension of economic reason and in the more specific and unique terms of being a source of fantasy concerning the nature of civil justice, one that ultimately translates into a disavowal of castration. ECJ acts as a mask that stakeholders rely on to perform the types of concealment that Lukács describes.

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<sup>515</sup> This will inform an analysis of Equity apropos a 'psychoanalytic process of perverse structure at the level of the process of ideological production' (Baudrillard, 1981, p.90).

<sup>516</sup> Georg Lukács. 1971. *History and Class Consciousness: Studies in Marxist Dialectics*. Translated by Rodney Livingstone. London: Merlin Press, p.14

Just as the notion of concealment ties Marx and Freud together in this instance, so too does completeness. Capitalism relies to a large extent on the failure of the subject to perfect or complete itself, because this failure drives demand and desire, and thus the constant and repetitious renewal of systems, institutions and, importantly, fantasies at the level of the capitalist superstructure able to offer opportunities for satisfaction, for finding the lost object. Capitalism thrives on lack of perfection as a general rule, whether at the level of the commodity, institution, system or subject, whilst simultaneously offering the promise to subjects that perfection is always near. Central to the notion of Equity fetishism is its ability to provide the subject, via language, with the means to disavow doubts regarding these promises capitalism makes, whilst simultaneously disavowing castration. And rather than a form of capitalism that does not work, and the traumatic realisation of castration that comes along with it, the subject instead believes because they have *knowledge* that Equity is not the thing and, importantly, subsequently choose to disavow that knowledge and enjoy an existence in fantasy under capitalism anyway<sup>517</sup>. Enjoyment that encompasses, in this instance, bureaucratic processes of civil justice that support stakeholder engagement in economic activity, competition with peers (fellow stakeholders), and the variegated risks of the market.

Freud in conjunction with Marx is, therefore, crucial to understanding the desires that underpin Equity and civil justice as part of a 'specific transformation of desire within and through the implementation of the capitalist worldview in social and subjective reality'<sup>518</sup>. 'If we were to force the analogy between Freudian fetishism and Marxian

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<sup>517</sup> For Walter Benjamin this made capitalism 'a religion of pure cult, without dogma'. 'The nature of the religious movement which is capitalism', Benjamin claims, 'entails endurance right to the end, to the point where God, too, finally takes on the entire burden of guilt, to the point where the universe has been taken over by that despair which is actually its secret *hope*' (Walter Benjamin. 1996. *Capitalism as Religion*, in *Walter Benjamin Selected Writings, Volume 1, 1913-1926*. Edited by Marcus Bullock and Michael W. Jennings. Cambridge: The Belknap Press of Harvard University Press, p.289)

<sup>518</sup> Tomšič, 2015, p.154

fetishism' says Jean-Joseph Goux, 'we might say that the *void* that is filled and veiled by the economic fetish is the "transcendental" element of interpersonal relations, of the exchange of vital activities'<sup>519</sup>. He concludes: 'But this "transcendental" aspect of exchange is precisely the location of the surplus value, which is concerned not only with the political economy but with social *power* in general'<sup>520</sup>.

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<sup>519</sup> Jean-Joseph Goux. 1990. *Symbolic Economies: After Marx and Freud*. Translated by Jennifer Curtiss Gage. Ithaca: Cornell University Press, p.158

<sup>520</sup> Goux, 1990, p.158

# Chapter 6

## *Fetishism in Context*

### 1. Introduction

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This chapter consists of two parts. First, a discussion on the relationship between fetishism and ideology that will look in more depth at the ideas raised earlier in the thesis. Second, given that fetishism is not a self-contained concept within Freud's work but exists in dialogue with a number of other formulations, in order to fully develop a theory of fetishism relevant to this thesis it is necessary to examine some of these other areas<sup>521</sup>. Covered during this chapter will be Freud's formulations of perversion, castration, phallus, and narcissism.

### 2. Fetishism and ideology

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The characteristics of fetishism and ideology as they appear and are discussed during this thesis overlap. They are individually significant, but so is the dialogue between them. To echo Henry Krips, I claim that a joint account of fetishism and ideology reveals 'how social structures, and specifically ideological practices, shape psychic structures at the communal level'<sup>522</sup>. The type of fetishism described here is thus reflective of the influence of capitalist ideology. Concomitant with the fantasies that capitalism arouses in order to shape society and the existence of subjects within it, by, for example, equating wealth and property ownership with subjective ideals of satisfaction, the subject engages in a fetishistic disavowal that permits knowledge and ignorance of the realities of capitalism

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<sup>521</sup> The task of defining and cross-referencing Freudian themes and concepts, even just those captured by his discussion of fetishism, far exceeds what is possible during the course of this thesis. Consequently, outlines will be limited to those considered and understood here to be most relevant. That is, concepts that feature in Freud's articles of 1927 and 1938, and around which Freud builds his formulation of the concept in those two articles.

<sup>522</sup> Henry Krips. 1999. *Fetish: An Erotics of Culture*. Ithaca: Cornell University Press, p.73

and capitalist ideology to coexist<sup>523</sup>. For instance, the disavowal of the fact that wealth and property ownership offer no guarantees of personal satisfaction, and, moreover, the subject is cynically prompted by capitalism to engage in an ongoing encounter between the loss of their object of primal desire and a series of substitutions that the subject is encouraged to believe will make up for that loss. It is the subject's search for the lost object and accumulation of fetishes as substitutions for what is lost that brings them into contact with socioeconomic and legal forms and institutions that promise to both deliver the object and help facilitate the subject's search for it. From the point of view of this thesis that means Equity, private property and civil justice, which together give the stakeholder the appearance of an answer to the question of the lack at the centre of their unconscious desires. In short, a fantasy built around the stakeholder's search for the lost object. And to the extent that Equity and institutions such as trusts become substitutions for the object themselves, they are fetishized.

At the heart of Marx's definition of 'the *fetishistic character*, which attaches to the products of labour so soon as they are produced in the form of commodities', is the notion that 'the commodity form and the value relation between the labour products which finds expression in the commodity form have nothing whatever to do with the physical properties of the commodities or with the material relations that arise out of these physical properties'<sup>524</sup>. Marx situates this definition in an analogy from the 'nebulous world of religion', whereby 'the products of the human mind become independent shapes, endowed with lives of their own'<sup>525</sup>. Hence even though Marx himself borrowed the concept of fetishism in order to address purely economic questions, as Žižek maintains:

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<sup>523</sup> McGowan, 2016, p.97

<sup>524</sup> Karl Marx. 1930. *Capital Volume 1*. London: J.M. Dent & Sons Ltd., pp.45-46

<sup>525</sup> Marx, 1930, p.45

‘the dialectics of the commodity-form present us with a pure – distilled, so to speak – version of a mechanism offering us a key to the theoretical understanding of phenomena which, at first sight, have nothing whatsoever to do with the field of political economy (law, religion, and so on)’<sup>526</sup>.

Where Equity fetishism is shown to be rooted in the private property order, any notion that Equity and political economy can have nothing in common, as Žižek claims with regard to the law more generally, is clearly false. Nevertheless, the notion that ‘in the commodity-form there is definitely more at stake than the commodity-form itself’ entirely accords with the argument made here that Equity fetishism begins with commodity fetishism, augments or channels it and thus fosters a peculiar (if not exactly new) modality rooted in the subject’s belief in and devotion to the administrative and bureaucratic object(ive)s of Equity and ECJ<sup>527</sup>. This echoes Henri Lefebvre’s suggestion that ‘[w]here economy and philosophy meet lies the theory of *fetishism*’, and it is possible to theorise therefore that where economy and Equity meet we find Equity fetishism<sup>528</sup>.

Althusser’s notion of interpellation explains Equity as a special signifying system *qua* fetish, via the significance of the overlap between fetishism and ideology. That ‘Equity can be described but not defined’ and that ‘[i]n order to understand the diversity and resultant power of equity it is vital to see it in action’ - in other words, Equity can be defined only by the contexts in which we ‘find’ it - is an indication of its slipperiness and sheer instability as a sign<sup>529</sup>. Equity, as we know, harbours other signs and chains of meaning: fairness, equality, ‘good’ conscience, and so on that allows it not only to lure subjects (a function of its fetishization; Böhme for example talks of the ‘magnetic power’

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<sup>526</sup> Žižek, 1989, p.9

<sup>527</sup> Žižek, 1989, p.9

<sup>528</sup> Henri Lefebvre. 2014. *Critique of Everyday Life*. London: Verso, p.198

<sup>529</sup> Meagher *et al*, 1992, p.4



of the fetish, as well as its ability to mesmerise and entice<sup>530</sup>), but, in accordance with Althusser's notion of interpellation, to 'hail' and thus recruit subjects and transform them into more engaged economic subjects by means of a system of civil justice steeped in capitalist ideology<sup>531</sup>.

As we have seen, the stakeholder who seeks, among other things, vindication of their private property rights or a remedy in the civil justice system, engages Equity and ECJ at a specific level of capitalist ideology. Étienne Balibar points to the significance of private property and the role of private law in determining the State infrastructure (the economic base) and superstructure (the politico-legal and ideological levels constructed on top of the economic base). '[T]he floors of the superstructure are not determinate in the last instance', says Althusser, 'they are determined by the effectivity of the base', a notion that Balibar builds on in his consideration of the law of property when he states the importance of 'characterizing the degree of relative autonomy of the economic structure with respect to the equally 'regional' structure of the 'legal and political forms'<sup>532</sup>. Within the ambit of what Balibar calls legal forms we can count certainty and flexibility as core intellectual and practical contributions that the conjunction of Common Law and Equity *qua* complete justice has made to the economic base of capitalist society.

Central to understanding civil justice and what it is expected to achieve on behalf of capitalist ideology in order to bring subjects into proximity with what Althusser considers the need 'to perform their tasks conscientiously', is the range of processes and strategies shaped by ideology that ECJ facilitates and enforces<sup>533</sup>. As we have seen,

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<sup>530</sup> Hartmut Böhme. 2014. *Fetishism and Culture: A Different Theory of Modernity*. Translated by Anna Galt. Berlin: De Gruyter, p.264

<sup>531</sup> Althusser, 2008, p.48

<sup>532</sup> Althusser, 2008, p.9; Étienne Balibar. 2009. On the Basic Concepts of Historical Materialism, in Louis Althusser and Étienne Balibar. *Reading Capital*. Translated by Ben Brewster. London: Verso, p.254

<sup>533</sup> Althusser, 2008, p.7

nowhere is this more apparent than the complicity of Equity in particular in the ideological processes underpinning the private property order. Under capitalism, property has unassailable significance as a potent ideological fiction of 'permanent and unstoppable progress with no foundations whatsoever in economic or political reality but which the self-proclaimed economic experts persistently substantiate with statistical data, economic mathematics and political [as well as legal] reforms throughout history' [my addition]<sup>534</sup>. Equity fetishism engenders a degree of enjoyment that relates to the ideological belief that, engagement with and in the private property order, epitomized by the use, abuse or alienation of property, enables 'a stable and full-functioning social relation' to emerge from the present social inequalities<sup>535</sup>.

Through the practices of civil justice and the bureaucratic means set in motion by Equity's rules, doctrines and principles, the fantasy of complete justice is sustained without ever being actualised or attained. Or rather, without it ever being known by the stakeholder that complete justice can *never* be attained. This point is crucial not simply because it adds further to the explanation of fetishism as a function of ideology in the domain of property, but because it reveals the vital ingredient of perversion which is central to Freud's interpretation and understanding of fetishism. That is, the perversion of a subject who finds enjoyment in the idea or knowledge of never locating the lost object, and, perhaps more interestingly, also in only ever mapping the coordinates of its possible location, namely an enjoyment in the bureaucracy of civil justice. This point recalls the earlier discussion of the significance of the neurotic legal pursuit for certainty of legal meaning in language, and its relationship to the perverse desire of the stakeholder, what

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<sup>534</sup> Tomšič, 2015, pp.162-163

<sup>535</sup> Tomšič, 2015, p.162

I referred to previously as the two working hand-in-hand in structuring a fantasy of Equity fetishism.

Further, the fixing of enjoyment onto an object, or in this instance a bureaucratic juridical pursuit of certainty, other than the object of desire reflects Krips' notion of a 'chaperone', which he links with Lacan's *objet a* as 'both objects of the drive and object-cause of desire'<sup>536</sup>. 'A chaperone', says Krips, 'may take on the characteristics of an *objet a*. Although not herself desired by the suitor, she is nonetheless the cause of his desire as well as the center of the evasive activities through which he produces his pleasure'<sup>537</sup>. Accordingly, we might say that Equity chaperones the stakeholder in the private property order by creating a layer of bureaucracy that alienates and distances the subject from the notional object of desire.

Baudrillard claims that fetishism attaches to a particular sign object 'eviscerated of its substance and history, and reduced to the state of marking a difference, epitomizing a whole system of differences'<sup>538</sup>. In order to understand fetishism, therefore, we must look for a particular object that has not simply been dissolved in the broader capitalist superstructure but completely eviscerated in respect to it. In other words, the fetish is never simply a material or conceptual prosthesis, but a monument to castration; it at once reveals and masks a site of lack that is always already in the subject. Ideology, in that sense, is an additional layer, a fictive cloak, which further conceals what the fetish already masks. Or, rather, there is a dialogue between fetishism and ideology that involves a doubling of concealment. In some cases, ideology precedes fetishism, in others the reverse is true.

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<sup>536</sup> Krips, 1999, p.28

<sup>537</sup> Krips, 1999, p.28

<sup>538</sup> Baudrillard, 1981, p.93

### 3. Concepts in relation to fetishism

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Fetishism, as succinctly put by Jean Baudrillard, is a 'psychoanalytic process of perverse structure'<sup>539</sup>. This formulation of fetishism refers, as Christopher Gemberchak has claimed, to Freud's 'mature' conceptualization found in his 1927 article *Fetishism*, as well as in his 1938 article *The Splitting of the Ego in Defence Processes*, and finally in his 1938-40 discussion of 'The External World' in *An Outline of Psycho-Analysis*<sup>540</sup>. All three sources build upon but differ from Freud's earlier work on fetishism stemming from his *Three Essays on Sexuality* in 1905<sup>541</sup>.

Across this body of work we see Freud's thinking on fetishism develop from the fetish as a replacement for the 'normal sexual object [...] by another which bears some relation to it, but is entirely unsuited to serve the normal sexual aim', to the idea that the fetish replaces 'a specific and very special' object, namely the mother's phallus<sup>542</sup>. Freud's earlier work on fetishism was also further developed in an unpublished paper, 'On the Genesis of Fetishism', presented to the Vienna Psycho-Analytical Society on 24 February

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<sup>539</sup> Baudrillard, 1981, p.90.

It is acknowledged here that fetishism was something Freud translated (conceptualized) via his own particular brand of psychoanalysis, rather than fetishism being a conceptual product of psychoanalysis as such. Moreover, Freud was not the first to discuss fetishism in the vocabulary of psychopathology, a move first made, it has been argued, by President de Brosses in his ethnographic work on religions during the eighteenth century (see: Jean-Joseph Goux. 2004a. *Vertigo of Substitutes: Fetish and Trophy*, in *Everyday Extraordinary: Encountering Fetishism with Marx, Freud and Lacan*. Edited by Christopher M. Gemberchak. Leuven: Leuven University Press, p.71). To clarify, whilst this thesis will focus mainly on fetishism as it is defined by Freudian psychoanalysis, other sources are relied upon. These include, most notably, fetishism as it is conceptualized in relation to the commodity (associated here with the concept of property rights *qua* private property order) in the work of Marx. And because of the importance of language to Equity fetishism the work of Jacques Lacan.

<sup>540</sup> Christopher M. Gemberchak. 2004b. *Fetishism and Bad Faith: A Freudian Rebuttal to Sartre*. *Janus Head*, 7(2), p.263; and Slavoj Žižek. 2008. *For They Know Not What They Do: Enjoyment as a Political Factor*. London: Verso, p.249. My primary source for Freud's two articles is: Sigmund Freud. 2006. *The Penguin Freud Reader*. Edited by Adam Phillips. London: Penguin Classics; and the discussion of fetishism in 'The External World' is in: Sigmund Freud. 1964. *Moses and Monotheism, An Outline of Psycho-Analysis and Other Works: The Standard Edition Volume XXIII (1937-1939)*. Translated and Edited by James Strachey. London: The Hogarth Press, pp.202-203

<sup>541</sup> Freud, 2001a.

<sup>542</sup> Freud, 2001a, p.153; Freud, 2006, p.90

1909<sup>543</sup>. The timing of this unpublished article is notable because it immediately followed Freud's introduction of the *castration complex* in 1908 in an article 'On the Sexual Theories of Children', and immediately preceded Freud's introduction of the *Oedipus complex* in his 1910 article, 'A Special Type of Choice of Object Made by Men', both of which would eventually come to underpin his mature theories on fetishism<sup>544</sup>. Chapter 7 will deal specifically with Equity fetishism and three of the primary features that structure fetishism based on Freud's mature conceptualization, namely, belief, disavowal (*Verleugnung*) and memorialization. In preparation for that later discussion, the remainder of this chapter will focus on four Freudian concepts that are important to understanding and explaining fetishism generally and in relation to the subject of this thesis, but are themselves not limited to fetishism as such. The four concepts are perversion, castration, phallus, and narcissism.

### 3.1 Perversion

In the *Three Essays on Sexuality*, Freud describes perversion under the heading 'deviations in respect of the sexual aim'<sup>545</sup>. 'The normal sexual aim is regarded as being the union of the genitals in the act known as copulation', says Freud, 'which leads to a release of the sexual tension and a temporary extinction of the sexual instinct – a satisfaction analogous to the sating of hunger'<sup>546</sup>. For Freud, there is a baseline instinct attributable to the subject's sexual aim which, once met, is extinguished. Importantly this A to B undertaking by the subject in attempting to satisfy the instinctual drive is considered *normal*. Freud continues: 'But even in the most normal sexual process we

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<sup>543</sup> 'Editor's Note' in Freud, 2001e, pp.149-150

<sup>544</sup> Introduction of the castration complex in: Sigmund Freud. 2001b. *Jensen's 'Gradiva' and Other Works: The Standard Edition Volume IX (1906-1908)*. Translated and Edited by James Strachey. London: Vintage. Introduction of the Oedipus complex in: Sigmund Freud. 2001c. *Five Lectures on Psychoanalysis, Leonardo De Vinci and Other Works: The Standard Edition Volume XI (1910)*. Translated and Edited by James Strachey. London: Vintage.

<sup>545</sup> Freud, 2001a, p.149

<sup>546</sup> Freud, 2001a, p.149

may detect rudiments which, if they had developed, would have led to the deviations described as ‘perversions’<sup>547</sup>. At a causal level perversion quite simply disrupts the A to B undertaking of satisfaction and describes a deviation in the form of A going not to B but to either C, D, E, F, and so on. Perversions are thus ‘sexual activities which either (a) extend, in an anatomical sense, beyond the regions of the body that are designed for sexual union, or (b) linger over the intermediate relations to the sexual object which should normally be traversed rapidly on the path towards the final sexual aim’<sup>548</sup>. It is amid this description of perversion that Freud first situates fetishism as cases ‘in which the normal sexual object is replaced by another which bears some relation to it, but is entirely unsuited to serve the normal sexual aim’<sup>549</sup>.

As stated previously this thesis does not settle on Freud’s initial formulation of fetishism in the *Three Essays*, but draws instead on his work on fetishism from 1927 onwards. Accordingly, it is important to understand how, if at all, Freud’s notion of perversion changed. Furthermore, it is important to understand that perversion transcends description only in terms of sexual practices. In other words, we can talk about perversions in terms of the sublimation of broader social practices and as a meta-psychology, even though, as Freud argued sublimation is an outcome of sexual instincts and drives. Further, a conjunction between Marx and Freud can be seen when Freud himself, in *Civilisation and Its Discontents*, offers a bridge between the personal (psychic) economy of the subject and the economic structure of society (supported by the private property order) across which perversion leaves its mark in the form of often subtle aberrations from the norm<sup>550</sup>. That is, to revert briefly to Freud’s earlier formulations of

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<sup>547</sup> Freud, 2001a, p.149

<sup>548</sup> Freud, 2001a, p.150

<sup>549</sup> Freud, 2001a, p.153

<sup>550</sup> Freud, 2001e

perversion, non-pathological forms of perversion that exist alongside the norm rather than ousting it<sup>551</sup>.

The later Freud, in ways that are of particular note here, locates perversion sublimated into the realm of property (whether tangible or intangible) and specifically 'the attraction in general of forbidden things' that countermands 'an undeniable diminution in the potentialities of enjoyment' brought about by a greater surrendering by the subject to the reality principle<sup>552</sup>. In search of enjoyment, the subject turns in fantasy to the 'irresistibility of perverse instincts' in order to satisfy desires<sup>553</sup>. This enables a negotiation of the frustrations presented by the external world, by unlocking forms of satisfaction and enjoyment that, even when not absolutely satisfactory, nonetheless possess a 'special quality' that seems 'finer and higher' than the norm<sup>554</sup>. That, in short, generates a fetishistic inversion akin, as Žižek suggests, to the commodity form in Marx's analysis. In the commodity form, as Žižek maintains, there is 'definitely more at stake than the commodity-form itself'<sup>555</sup>. As far as Equity fetishism is concerned, as with other examples of fetishism that help explain the vagaries of social relations in fields beyond the economic interpretation offered by Marx, it is the 'more' that Žižek highlights that is key to understanding what he calls 'the fascinating power of attraction' wielded by the fetish over numerous fields of social relations<sup>556</sup>.

Insofar as perversion is defined as a deviation from normality, despite Marx not using the term himself, it is possible to make the case that Marx's use of fetishism relies on a reading of socioeconomic structures that are, in themselves, perverse. This is because these

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<sup>551</sup> Freud, 2001a, p.161

<sup>552</sup> Freud, 2001e, p.79

<sup>553</sup> Freud, 2001e, p.79

<sup>554</sup> Freud, 2001e, p.79

<sup>555</sup> Slavoj Žižek. 1989. *The Sublime Object of Ideology*. London: Verso, p.9

<sup>556</sup> Žižek, 1989, p.10

relations, as Marx says, are based in the ‘very queer’ nature of the commodity which is ‘full of metaphysical subtleties and theological whimsies’<sup>557</sup>. Inversely Marx’s use of fetishism is anything but perverse precisely because it posits objectively the normal socioeconomic conditions as they exist under capitalism. For Marx, there is no escaping the fetishistic character of the commodity form because it mirrors fundamental social relations. Similarly, I claim, Equity fetishism is a product of the *normal* functioning of civil justice, insofar as its function is in accordance with economic reason and logic.

Following Marx, we can see that Equity fetishism begins from a point in which the fetishistic character at the heart of private property order represents the *status quo*. And it is possible to understand the perversion of Equity fetishism in this sense by reconsidering Gray and Gray’s definition of property not as a thing but a *power relationship*, whereby ‘a relationship of social and legal legitimacy’ exists ‘between a person and a valued resource (whether tangible or intangible)’<sup>558</sup>. Inasmuch as the relationship Gray and Gray highlight mirrors the nature of commodity fetishism outlined by Marx, then it is normatively fetishistic in nature. In other words, Gray and Gray’s outline can be adjusted to read: ‘a relationship of social [...] legitimacy existing between a person and a valued resource (whether tangible or intangible)’. A relationship that retains or emphasizes only the *social* dimension of the property order’s legitimacy.

The perversion of Equity fetishism thus lies in interventions in the realm of civil justice by Equity that, literally-speaking, pervert a purely social legitimacy existing between a person and a valued resource by constructing or imposing the fantasy (latent in capitalism) of complete justice and Equity’s legitimacy onto the private property order.

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<sup>557</sup> Marx, 1930, p.44

<sup>558</sup> Gray and Gray, 2009, p.87



In this instance, the focus is on the point at which property and law intersect and establish, in Gray and Gray's terms 'legitimacy', and in the terms of this thesis, Equity fetishism. Further, if the 'theory of fetishism demonstrates the *economic, everyday* basis of the *philosophical* theories of mystification and alienation' as Lefebvre claims, then the perversity of Equity fetishism can also be said to lie in Equity's alienation of already alienated commodity (property) forms<sup>559</sup>. This means that Equity fetishism enacts a further masking of the immediacy of economic and social realities beyond that already maintained by the commodity form as such, and thus further envelops and disguises the human relations that constitute the property form<sup>560</sup>.

What is at stake from this deeper mystification of social relations enacted by Equity fetishism is precisely that which describes the difference between the economic (Marxist) and (meta)psychological (Freudian) fetish. Namely, suspension of the social link and an increased atomization of the subject that reflects the notion that the economic fetish 'may be the privileged embodiment of value, but it is also the support of exchange', as Samo Tomšič explains, whilst the fetish in Freudian terms, by contrast, 'excludes the economy exchange and bends the libidinal economy back onto itself'<sup>561</sup>. As a consequence, it is 'strictly private' perverse subjects who recognise only themselves in the property form as 'selfish' litigant and de-socialized (de-humanized) individuals, in ways that equally accord with the concept of narcissism, as will be discussed shortly<sup>562</sup>. So, whilst '[m]an has developed and has raised himself above the animal and biological condition of his lowly beginnings via socio-economic fetishism and self-alienation', as Lefebvre contends, it has resulted in very particular outcomes in terms of the concept of the subject of

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<sup>559</sup> Lefebvre, 2014, p.199

<sup>560</sup> Lefebvre, 2014, p.199

<sup>561</sup> Tomšič, 2015, p.154

<sup>562</sup> Jolowicz, 1983; Tomšič, 2015, p.154

capitalism as it is defined here, namely, '*[t]he human has been formed through dehumanization – dialectically*'<sup>563</sup>. As Tomšič states: 'Capitalism is *not* perversion, but it *demands* perversion from its subjects', and via Equity fetishism, the stakeholder is able to realise this perverse duty<sup>564</sup>.

### 3.2 Castration

Castration is a central theme in fetishism, as it was for much of Freud's work. Given the notable privileging of the male gender in his formulation of theories of sexuality, Freud often evokes a literal sense of castration (the cutting off of the penis) in his discussions. This literality occurs in Freud's discussion of fetishism, as elsewhere in his work (the basis of the anxiety that initiates the latency period in boys and which informs the *castration complex*), when, for example, the fetishist (Freud refers to the 'patient') is confronted by the 'proof of the possibility of his being castrated himself' by the fact that females have no penis<sup>565</sup>. In her thesis on the erotics of markets, Jeanne Schroeder discusses the particular gendered aspects of castration. 'The two sexes are two positions one can take with respect to castration', claims Schroeder, 'denial and acceptance. The masculine, which feels that he has lost a precious part of himself, falsely claims to possess and exchange the object of desire. The feminine, which feels that she has lost her selfhood, accepts the role of identification with the enjoyment of the object of desire'<sup>566</sup>. Freud considers castration a male concern (the patient 'who is almost always male'), albeit in dialogue with a corresponding discovery of anatomical difference to the female body<sup>567</sup>. This point of difference is important not in and of itself, but rather in as much

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<sup>563</sup> Lefebvre, 2014, p.200

<sup>564</sup> Tomšič, 2015, p.151

<sup>565</sup> Freud, 1964, p.202

<sup>566</sup> Schroeder, 2004, p.241. Following Jacques Lacan, Schroeder further develops her analysis by exploring the ways in which the feminine does not so much reside as a separate form of castration from the masculine, as one that the masculine represses and thus ultimately denies.

<sup>567</sup> Freud, 1964, p.202

that it is always accompanied by a *threat* of parity. That is, the fact (the threat) that the male, via castration, can be made like the female, adding further to the anxiety of the subject. For the fetishist, the fetish object serves partly as a means of dispelling or displacing this anxiety. 'The creation of the fetish', says Freud, 'was due to an intention to destroy the evidence for the possibility of castration, so the fear of castration could be avoided'<sup>568</sup>.

Whilst Freud often evokes a literal sense of castration through direct reference to the penis, his reliance on myth (namely the Oedipus myth) as a basis for much of his aetiology betrays the fact that castration and the particular reference to anatomical organ (penis) is not meant literally as *the* site of primal desire that is central to the development of human sexuality. Rather, as Henry Krips suggests, '[i]n the case of fetishism staged within the Oedipus myth, as for fetishism generally, the object of desire must reside somewhere other than the fetish'<sup>569</sup>. Hence, as the paradigm of negativity ('the symbolic operation that constitutes the subject as split and decentralised') castration corresponds closely with psychic functions such as fantasy and the concept of loss<sup>570</sup>. Or, given the terms of the present discussion, 'the capitalist fantasy of an uncastrated subject'<sup>571</sup>. The castration and Oedipus complexes both focus on the child's fantasy concerning his father, or as Freud frames it in *Totem and Taboo*, 'the part of a dreaded enemy to the sexual interests of childhood', who threatens to punish the child by castration 'or its substitute, blinding'<sup>572</sup>. The threat, therefore, further to that discussed above, relates to fantasy as a

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<sup>568</sup> Freud, 1964, p.203

<sup>569</sup> Krips, 1999, p.69

<sup>570</sup> Tomšič, 2015, p.152

<sup>571</sup> Tomšič, 2015, p.152

<sup>572</sup> Sigmund Freud. 2001d. *Totem and Taboo and Other Works: The Standard Edition Volume XIII (1913-1914)*. Translated and Edited by James Strachey. London: Vintage, p.130

means of deflecting the trauma of castration whilst facilitating the repetition of primal desires that are structured around the infliction of loss<sup>573</sup>.

The connection between castration and the inauguration of the super-ego function has particular resonance with respect to the language of Equity because it is through the super-ego that Freud traces the roots of conscience<sup>574</sup>. The super-ego function, namely, the internalized inheritance of the parental influence, that 'garrison in a conquered city' that 'takes the father's place, depersonalizing the father figure and incorporating it in the subject in the form of a higher and punitive law'<sup>575</sup>. With regard to legal critique, this makes castration an important theme because it talks to the social (externalized) function of law. In a description of conscience that would befit historical narratives of Equity, namely those pertaining to a time when Equity was the preserve of Roman Catholic lawyers such as Thomas More, Freud maintains that: 'As long as things go well with a man his conscience is lenient and lets the ego do all sorts of things; but when misfortune befalls him, he searches his soul, acknowledges his sinfulness, heightens the demands of his conscience, imposes abstinences on himself and punishes himself with penances'<sup>576</sup>. The function of the super-ego, whilst clearly important to a critique of Equity, does take the matter of castration away from the central theme of fetishism and is therefore not overly relevant here. It warrants mention however because, as Freud maintains, the 'super-ego is in fact the heir to the Oedipus complex and is only established after the complex has been disposed of', which, as a description of the psychic basis to the formation of

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<sup>573</sup> Freud, 2006, p.94

<sup>574</sup> Freud, 2001e, p.125

<sup>575</sup> Freud, 2001e, p.124; Maria Aristodemou. 2014. *Law, Psychoanalysis, Society: Taking the Unconscious Seriously*. London: Routledge, p.55

<sup>576</sup> Freud, 2001e, p.126

subjective conscience, is clearly significant for understanding the extension of conscience as a juridical mechanism within Equity<sup>577</sup>.

Above all castration needs to be read as a symbolic gesture. As such, castration ceases to represent anatomy (the penis) and instead describes the loss of an object of desire, namely the phallus, which the subject is always searching for. So, whilst Freud states on the one hand that 'the fetish is a penis substitute', it is nevertheless also a substitute for 'the woman's (mother's) phallus'<sup>578</sup>. How fetishism is structured around the symbolic gesture of castration – how, for example, 'the fetishist denies [disavows] the unwelcome fact of female castration' – will be considered in Chapter 7<sup>579</sup>. It is worth noting at this point however that castration is central to the issue of compromise as a vital feature of memorialization in fetishism. A compromise, as Böhme maintains, 'that is made in the unconscious between the fear of castration and the saviour of the phallus'<sup>580</sup>.

### 3.3 Phallus

With regard to fetishism, a crucial question is as the quote from Freud above suggests, the extent to which the phallus and penis are interchangeable. That is, where a strictly anatomical or biological reference ends and symbolism begins; a shift in reference between genitalia that the male possess and that the female lacks, a gap in which (in the in-between) a prosthesis or substitute in fantasy for the penis can be imagined, one capable of preventing the subject from trembling 'for the continued possession of one's own penis'<sup>581</sup>. For Freud, the phallic phase of sexual development is signalled by a divergence between the sexes from the premise of 'the universal presence of the penis'<sup>582</sup>.

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<sup>577</sup> Freud, 1964, p.205

<sup>578</sup> Freud, 2006, pp.90-91

<sup>579</sup> Freud, 2006, p.93

<sup>580</sup> Böhme, 2014, p.319

<sup>581</sup> Freud, 1964, p.203

<sup>582</sup> Freud, 1964, p.154

This divergence lies at the root of Freud's particularly patriarchal distinction between the development of male sexuality versus the vain attempts of female sexuality to 'do the same as the boy', which for Freud ultimately leads to (penis) envy, a sense of inferiority, and the 'first disappointment in rivalry' for the girl against the boy<sup>583</sup>.

Post-Freud, and most notably in the work of Jacques Lacan, the phallus ceases to be a mere synonym for the penis, and functions instead, as Böhme maintains, as 'the symbolic counterpart to castration'<sup>584</sup>. This Lacanian shift in phallic status indicates the significance of the organ to fantasy and in distinction to Freud 'that the accession to subjectivity involves introducing the subject into an economy of lack defined in relation to the phallus'<sup>585</sup>. Henry Krips calls this the 'omnihistorical' significance that Lacan gives to the phallus helps to further distinguish the penis from the phallus, and thus, as Krips further argues, 'Lacan's reworking of the Freudian architectonic promises to avoid' the privileged place Freud's theory of castration gives to 'the penis in the constitution of the human psychic economy'<sup>586</sup>. For Krips, the 'Lacanian reworking of the Freudian architectonic enables a reconceptualization of the fetish', most notably in terms of Lacan's designation of the object of desire (*objet a*) *qua* phallus<sup>587</sup>. However, it has also been argued that Lacan's designation of the phallus simply 'responds to the logic implicit in Freud's formulations on the penis', and, therefore, 'Lacan's terminological innovation simply clarifies certain distinctions that were already implicit in Freud's work'<sup>588</sup>.

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<sup>583</sup> Freud, 1964, pp.154-155

<sup>584</sup> Böhme, 2014, p.297

<sup>585</sup> Krips, 1999, p.8

<sup>586</sup> Krips, 1999, p.8

<sup>587</sup> Krips, 1999, p.9

<sup>588</sup> Dylan Evans. 1996. *An Introductory Dictionary of Lacanian Psychoanalysis*. London: Routledge, pp.140-141

The distinction Lacan makes between the penis and phallus is important, especially where it allows for a conceptualization of the socioeconomic significance and function of the phallus that highlights the importance of lack in understanding, not only certain motivations underpinning fetishism, but the broader ideological effects that lack is complicit in defining. For example, how the phallus is conceptually important to a critique of law *qua* bureaucratic systems, administrations and institutions of authority. The 'phallus as the signifier of lack in the Other, where the place of the Other (which may be occupied by the mother, a policeman, or any other authority figure) is', Krips maintains, 'the externally projected position from which the subject looks for an answer to the question of his or her own desire'<sup>589</sup>.

Translated into the terms of the present thesis: Equity or ECJ as a substitute phallus (fetish) is a response to the lack in complete justice (Other), which is the externally projected position of desire for the economic subject. Specifically, it is a position engendered by the displacement onto individual or atomised private property or the private property order more generally of a primal subjective desire for the lost object. Whether as an abstract socio-legal concept, a politico-economic institution (a sedimentation of longstanding customs and traditions) or order (something that is both organized at the social level and in turn organizes the social), in private property the subject has a site to which they are able to return time and again in search of the lost object and an answer to their own desire. As a mediator of this interaction between the stakeholder and property Equity occupies the position of the (substitute) phallus, a position in fantasy that points to a fundamental lack in complete justice, whilst staving

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<sup>589</sup> Krips, 1999, p.8

off the anxieties of stakeholders locked into a pattern of repeating their own primal lack with no hope of resolution or satisfaction.

### 3.4 Narcissism

While Freud introduces narcissism as a perversion ('an individual treats his own body in the same way in which he might treat that of any other sexual object'), an analytic status that would perhaps more readily explain its relationship to fetishism (as itself a perverse mechanism), he is quick to acknowledge that, via what he calls 'the difficulties encountered in the psychoanalytical treatment of neurotics', narcissism is also found in 'the normal sexual development of human beings'<sup>590</sup>. Further supported by the same biological inferences that Freud applies to his theory of the drives, notably the object-cathexis discussed earlier in this chapter which plays a central role in the theory of narcissism, Freud offers two statements in *On the Introduction of Narcissism* that will structure the extent of the definition deemed necessary here.

Firstly, Freud's notion of the double-existence of the individual 'both as an end in himself, and as a link in a chain that he serves against his will, or at any rate regardless of his will'; he continues (finally summarizing his point with an uncanny reference to property law):

He even supposes sexuality to be one of his own designs – whereas on alternative view he appears as a mere appendage of his germ-plasm, to whose purposes he devotes all his energies in return for the reward of a mere sensation of pleasure. On this view, he is but the mortal vehicle of a – perhaps – immortal essence; like the lord of an entailed estate, he is but the temporary occupant of an institution that will outlast him<sup>591</sup>.

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<sup>590</sup> Freud, 2006, p.358

<sup>591</sup> Freud, 2006, pp.362-363



Secondly, that the 'development of the ego consists in an ever-increasing separation from one's primary narcissism, and gives rise to an intense struggle to retrieve it'; Freud continues:

This separation occurs through the displacement of libido on to an ego-ideal imposed from without; gratification occurs through fulfilment of that ideal. At the same time, the ego sends forth libidinal object-cathexes. It becomes depleted for the sake of these cathexes and for the sake of the ego-ideal, but replenishes itself through object-gratifications and through fulfilment of the ideal<sup>592</sup>.

Both statements turn upon an account of narcissism predicated on the subject's investment in an object other to the self. Further, investment in the object as an external conductor (material or ideal) through which to channel what Freud refers to as the 'intense struggle to retrieve' a primary narcissism being lost relative to 'an ever-increasing separation'<sup>593</sup>. Narcissism is not a process without consequences for the internal psychic structure of the subject. Indeed, the fact that the second statement focuses so intently on the ego betrays Freud's orientation of narcissism simultaneously across internal and external worlds. As the two statements suggest, narcissism is a far-reaching concept in Freud's work that intersects with his other formulations. To ensure that the consideration of narcissism undertaken here remains within the margins of the concept of fetishism we must return to Freud's direct reference to narcissism in his mature formulation of fetishism. Here is the passage in full in which Freud applies the concept of narcissism to fetishism:

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<sup>592</sup> Freud, 2006, p.386

<sup>593</sup> Freud, 2006, p.386

[A] fetish is a substitute for the woman's (mother's) phallus, which the little boy once believed in and which – for reasons well known to us – he does not want to give up. What has happened, then, is this: the boy has refused to acknowledge the fact that he has perceived that women have no penis. No, this cannot be true, because if women have been castrated, then his own penis is in danger, *and the piece of narcissism, with which nature providently equips this very organ, recoils at the thought* [my emphasis]<sup>594</sup>.

Here Freud applies narcissism in a very similar vein to that regarding the child's reconciliation of the ego and sexual drives in the body (breast) of the mother. On the matter of that particular formative stage in the development of the drives Freud maintains that: 'There is no doubt that, to begin with, the child does not distinguish between the breast and its own body; when the breast has to be separated from the body and shifted to the *'outside'* because the child so often finds it absent, it carries with it as an *'object'* a part of the original narcissistic libidinal cathexis'<sup>595</sup>.

That Freud conceptually connects the organ (penis) equipped with 'a piece of narcissism' and the external object (breast) as a part of the original narcissistic libidinal cathexis is entirely accurate given the proximity of the two as stages in Freud's development of human sexuality: the mother is the child's first seducer and the 'prototype of all later love-relations'<sup>596</sup>. Thus it is from the object-breast to object-penis and the child's manipulation of each in turn in order to both satisfy a need and derive pleasure that means narcissism is translated along the chain of sexual development, eventually finding its way into the theory of fetishism as and when a perverse shift occurs in sexual

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<sup>594</sup> Freud, 2006, p.91

<sup>595</sup> Freud, 1964, p.188

<sup>596</sup> Freud, 1964, p.188

development. As maintained above, therefore, it is across both internal and external worlds that narcissism features in fetishism and in particular at the point of the ego's recoiling at the thought of castration, allowing the fetish to inhabit a space in fantasy 'opened up by the demise of primary narcissism'<sup>597</sup>.

Narcissism apropos fetishism plays a vital role on two successive counts. Firstly, as an indication of a primary inseparable unity or totality (the child with the mother). This primary narcissism is directly related to the primal desire *qua* mother-child relation, hence why it is so powerful a force acting on the psychic economy of the subject long after childhood. Moreover, why the subject repeatedly invests a great deal of energy trying to find the lost object and restore a sense of unity and completeness that the object is believed to represent. That restoration of the primal unity is clearly an impossible task explains why the subject willingly invests so much energy (time, money, property, exposure to risk, and so on) in trying to recreate the unity or instituting fetishes able to support the fantasy of completeness. Complete justice, as described thus far, is symptomatic of this attempt at replication of primary narcissism within the complementary fields of private property and civil justice.

Secondly, a secondary narcissism emerges as a form of alienation that constantly reminds the subject that they have settled for less than their heart's desire. That is, they have not, and never will return to primary narcissism because the lost object is, by definition, always already lost and unrecoverable. This secondary (traumatic) narcissism is central to fetishism because the fetish offers the subject a belief in the possibility of a return to primary narcissism, albeit a fantastical belief accompanied by a necessary process of

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<sup>597</sup> Gernerchak, 2004a, p.39

disavowal that at once sustains the fantasy and mitigates the subject's anxiety concerning the lost object of desire.

# Chapter 7

## *Equity Fetishism*

### 1. Introduction

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Previous chapters have discussed the theoretical as well as material foundations of Equity fetishism, which can be summarized in the following three points. Firstly, Equity fetishism draws upon and combines key elements of the theoretical work of both Marx and Freud, and is a phenomenon particularly associated with the socioeconomic and juridical existence of stakeholders within capitalism. Secondly, central to Equity fetishism (as with all forms of fetishism) is a stakeholder *qua* subject whose search for complete justice is a response in fantasy to the traumatic fact of castration and the need to disavow it. And thirdly, the private property order overseen by civil justice is where stakeholder's Equity fetishism is located and plays-out. That is, a site in which the stakeholder finds particular, perverse enjoyment in the form and substance of civil justice, including vindication of property rights as a basis to support a culture of ownership and wealth provision.

Building on these three foundations the following chapter will return to Freud's formulation of fetishism in order to finalise the theoretical outline and give a clearer picture of why it is Freud's and not simply Marx's interpretation of fetishism that ultimately counts during this thesis. This exploration will concentrate on three of the main psychical functions that structure fetishism and which, to paraphrase Freud, make

it a very energetic action to maintain denial of castration, *belief; disavowal; and memorialization*<sup>598</sup>.

## 2. Belief

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Freud's core statement on fetishism involves a crucial instance of belief that occurs within the broader Oedipal aetiology and thus turns on the fundamental issue of castration and loss. '[A] fetish is a substitute for the woman's (mother's) phallus, which', claims Freud, 'the little boy once believed in and which – for reasons well known to us – he does not want to give up'<sup>599</sup>. The nature of the belief that Freud highlights is one which necessarily prevails in order for the fetish to function. Belief marks the subject (little boy) in the past, the present and is expected to endure into the future. Moreover, holding onto belief as such vouchsafes it for the subject into the future, endowing it with a certain narcissistic quality that Freud also attributes to the general function of the fetish<sup>600</sup>.

Belief exists within the oedipal aetiology as complicit in an unavoidable confrontation that reveals a further important dimension to the belief in question. That is, belief is always already primed for a confrontation with a reality in which loss has occurred, a reality the fetish ought or is expected to mask. Following Freud's 'little boy', Christopher Gernerchak maintains that 'because reality does not conform to what he hopes and expects it will be, he simply prefers it otherwise. He chooses, in effect, not to know what he knows'<sup>601</sup>. Whilst Gernerchak is effectively pointing to the importance of disavowal to the fetish structure in his statement, something that will be discussed in detail later in

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<sup>598</sup> Sigmund Freud. 2006. Fetishism, in *The Freud Reader*. Edited by Adam Phillips. London: Penguin Classics, p.91

<sup>599</sup> Freud, 2006, p.91

<sup>600</sup> Freud, 2006, p.91

<sup>601</sup> Gernerchak, 2004b, p.262

this chapter, it equally reveals a deliberate and, importantly, conscious commitment to belief made by the subject.

‘At its most fundamental’, Žižek argues, ‘authentic belief does not concern facts, but gives expression to an unconditional ethical commitment’<sup>602</sup>. Žižek’s evaluation of belief here is not one derived from an analysis of fetishism. Yet, the ethical commitment of which Žižek speaks is one that resonates with the type of belief evoked by the fetish as a counterfactual function that ought, is expected or anticipated to mask the duality of the traumatic reality of castration and loss on behalf of the stakeholder. In other words, the commitment of the fetishist is precisely not ethical, but belief, consciously determined and thus not ignorant, maintains that it is<sup>603</sup>. As far as there is a perverse ethical commitment within the structure of fetishism, therefore, it is a commitment that the subject reserves for or turns back (imposes) upon themselves. A form of self-commitment contained within a closed circuit of desire that exists only between the fetishist and the object.

Whilst it remains the case that the fetishist is not absolved of an ethical responsibility, albeit a responsibility to themselves (to that piece of narcissism within the subject), it is a commitment that manifests as loyalty to the self or a self-regarding ethics, one that speaks to Freud’s concept of the *ideal ego* which in transferring the individual’s

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<sup>602</sup> Slavoj Žižek. 2007. *How to Read Lacan*. New York: W.W. Norton & Company, p.117

<sup>603</sup> Kant arguably predicted (or vouchsafed) ‘authentic belief’ as a basis of Equity fetishism via his notion of *reverence*. ‘What I recognise immediately as a law for me’ claims Kant, ‘I recognise with reverence, which means merely consciousness of the *subordination* of my will to a law without the mediation of external influences on my senses’. He continues: ‘Immediate determination of the will by the law and consciousness of this determination is called *reverence*’, so that reverence is regarded as the *effect* of the law on the subject and not as the *cause* of the law [...] The *object* of reverence is the *law* alone – that law which we impose *on ourselves* but yet as necessary in itself [...] All moral *interest*, so-called, consists solely in *reverence* for the law” (Immanuel Kant. 2005. *The Moral Law*. Translated by H. J. Paton. London: Routledge Classics, p.73)

narcissism, 'finds itself possessed of every estimable perfection'<sup>604</sup>. Self-regarding ethics and an associated belief structure that helps support it find particular form in private property and the corresponding alienation of the self that occurs with the desire to have rights and to own what is 'mine'<sup>605</sup>. On this matter, we can again see how Equity fetishism marries two of the most significant contributions on the sociocultural and economic impact of fetishism, namely the commodity fetishism of Marx and the psychology of Freud. The alienation caused by the great ascendancy in the social sphere of the status of property rights and ownership beyond all but the most wealthy during the nineteenth century was a product of parallel sociocultural and economic shift. Pashukanis maintains that the 'dialectical development of the fundamental juridical concepts not only provides us with the legal form as a fully developed and articulated structure, but also reflects the actual process of historical development, a process which is synonymous with the process of development of bourgeois society itself'<sup>606</sup>. Hence, I argue, it is important to consider Equity in that century, and thereafter, in terms of fetishism, and why the significance of the Judicature reform agenda as conceived *within* the ambit of capitalism cannot be overlooked.

'It can be argued', says Böhme, 'that the nineteenth century is [...] *the* saeculum of things'<sup>607</sup>. He continues:

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<sup>604</sup> Sigmund Freud. 2006. On the Introduction of Narcissism, in *The Penguin Freud Reader*. Edited by Adam Phillips. London: Penguin Classics, p.380. Further to this point, Freud also highlights the importance of distinguishing between *idealization* and *sublimation*, the former, as suggested above, is a more relevant associate of fetishism. As Freud maintains: 'To the extent [...] that sublimation has to do with drives whereas idealization has to do with objects, the two concepts need to be clearly distinguished from each other' (Freud, 2006, p.381)

<sup>605</sup> Davies, 1999, p.328

<sup>606</sup> Pashukanis, 1989, p.59

<sup>607</sup> Böhme, 2014, p.5



Statistics about things show that compared to the eighteenth century, the number of available things, for example in a household, vastly increased. Industrialisation led to the proliferation of artificial things in daily use and consumption, and not just in the upper classes. Newly appearing department stores were described as cathedrals of commodities, displaying hundreds of thousands of things to bewitch the customer in an almost ritually staged presentation [...] The average person extended the borders of his or her self into more and more object-spheres too. Stronger forms of capitalism promoted the pursuit of property, which often led to, for example, the bourgeois apartments of the *Gründrzeit*, stuffed with an almost unimaginable number of things [...] People collected, traded, procured, desired, exhibited, consumed, used, bought and sold, hoarded and wasted, ordered and classified, evaluated and valued things with a mania and intensity unprecedented in the history of everyday life<sup>608</sup>.

The forms of fetishism that Böhme directly attributes to the proliferation of material property and which I argue extends equally over a desire for property (and personal) rights made possible by civil justice, reveals the root system of self-regarding ethics and belief in contemporary capitalist society. And explains why Equity fetishism is central to the economic life of self-respecting (and self-regarding) stakeholders. Further, Equity fetishism aptly fits the measure of this type of belief insofar as it is or can be viewed in terms of 'premodern forms and institutions of magic, myth and cult, religion and festivities', which, as Böhme maintains, 'begin to disappear in the modern era', although 'the energies and needs bound up in them does not'<sup>609</sup>. Instead, Böhme argues, 'they are

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<sup>608</sup> Böhme, 2014, p.5

<sup>609</sup> Böhme, 2014, p.8

released and now pervade all levels of modern social systems', a view that, whilst speaking to a far broader consideration of fetishism, nevertheless captures a sense of Equity and specifically the legacy of ecclesiastical conscience on its jurisprudence and procedure – an idea discussed earlier with regard to the ongoing influence of Thomas More on contemporary civil justice<sup>610</sup>.

### 3. Disavowal

In order to develop the role played by belief in structuring fetishism it is vital to consider disavowal, which is understood here, simply, as a 'simultaneous acknowledgment and denial'<sup>611</sup>. Disavowal is key to explaining why fetishism engages conscious processes as much if not more than those of the unconscious and why an analysis of fetishism does not begin and end with the unconscious. 'The first movement of disavowal is avowal', states Gernerchak, hence there is 'no disavowal without prior knowledge, and so it is clear that one cannot claim [retention] of belief out of ignorance'<sup>612</sup>. For present purposes, the significance of disavowal in fetishism begins with Octave Mannoni's well known formulation ("Je sais bien, mais quand-même..."), in which the fetishist knows very well that the fetish is not *the thing* (*das ding*), but nevertheless chooses to turn away from such a reality by believing otherwise. For Mannoni the question at the heart of fetishism is, therefore, one of 'the possibility of simultaneously embracing two contrary beliefs, one official and one secret', which triggers a subjective paradox in the fetishist<sup>613</sup>. Moreover, on Mannoni's account, this simultaneous abandonment and retention of belief is an everyday perhaps even banal occurrence, rather than the perverse undercurrent of life,

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<sup>610</sup> Böhme, 2014, p.8

<sup>611</sup> Gernerchak, 2004b, p.262

<sup>612</sup> Gernerchak, 2004b, p.262

<sup>613</sup> Octave Mannoni. 2015. *Freud: Theory of the Unconscious*. Translated by Renaud Bruce. London: Verso, p.151

which further adds to the notion of Equity fetishism as normative. A key difference that Mannoni highlights between the types of belief found in Freud's formulation of fetishism and other psychic mechanisms for the repression and negation of ideas is precisely the fact that the belief is repudiated but not repressed nor denied as such<sup>614</sup>. In short, Mannoni points to the importance of disavowal in maintaining both the structure of belief and by extension the structure of the fetish itself.

Gemerchak echoes Mannoni in viewing disavowal as responsible for fetishism. '[O]nly by expanding Freud's notion of disavowal', argues Gemerchak, 'will we be able to understand fetishism as a fundamental possibility for the human subject'<sup>615</sup>. Disavowal is, Gemerchak further explains, 'the psychic anomaly that underpins Freud's mature conception of fetishism [...] an anomaly which henceforth served as a model for analysing structures as diverse as Marxist commodity fetishism, the Lacanian *objet a*, and primitive belief'<sup>616</sup>. Disavowal is thus crucial on a number of different but interrelated fronts, all of which provide an explanation for certain forms of subjective existence in society. The outline of split ego defence with which Freud further developed his 'mature' understanding of fetishism speaks to divisions within the subject which not only bring to bear a certain belief but also sets in motion a *partial repression* of that belief in which disavowal plays a key role. Recalling the point made earlier, disavowal begins with an avowal and thus we find an indication of the split at a pivotal point in the establishment of the fetish. The partial repression of belief and the turning away from reality that simultaneously forms that belief structure does not occur in ignorance of the hitherto disavowed reality. It does not qualify, so to speak, for (full) repression insofar as there

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<sup>614</sup> Mannoni, 2015, p.151

<sup>615</sup> Gemerchak, 2004a, p.16

<sup>616</sup> Gemerchak, 2004b, pp.249-250

does not exist an overriding motive of avoiding unpleasure<sup>617</sup>. On the contrary, the repression of belief is partial precisely because it occurs after a *conscious* avowal of the knowledge held by the subject. In other words, the content of the avowal remained in consciousness and was not turned away from it<sup>618</sup>.

The particular repression of belief, important I claim to an understanding of Equity fetishism, can be illustrated more clearly if contrasted with another corresponding fetish structure in which knowledge is repressed. Following Žižek, consider the position in which the subject proclaims, “(I know that God exists, but nevertheless) I act as though I believe that there is no God” – what he represses’, claims Žižek referring to the part in brackets, ‘is the *knowledge* of the existence of God’<sup>619</sup>. This is contrasted with repression of belief, whereby, as Žižek explains, a ‘gap between (real) knowledge and (symbolic) belief determines our everyday ideological attitude: “I know that there is no God, but nevertheless I operate as if (I believe that) he exists” – the part in brackets is repressed (belief in a God whom we witness through our activity is unconscious)’<sup>620</sup>. For present purposes this example can be rewritten in order to take the perspective of a stakeholder: I know that there is no such thing as complete justice, but nevertheless I conduct my business as if there is, and, what is more, Equity is proof of it.

What is more, disavowal enables the stakeholder to enjoy that existence, which again highlights the peculiarly perverse rather than simply neurotic structure of fetishism, the latter being that part of Equity fetishism provided by the legal community as purveyors of legal expertise, knowledge and meaning. In making his distinction, Freud posits neuroses as ‘the *negative* of perversion’, and that like a ‘stream of water which meets with

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<sup>617</sup> Freud, 2005, p.36

<sup>618</sup> Freud, 2005, p.36

<sup>619</sup> Žižek, 2008, p.243

<sup>620</sup> Žižek, 2008, p.243

an obstacle in the river-bed', the motive forces leading to the formation of hysterical symptoms in neurotics 'draw their strength not only from repressed *normal* sexuality but also from unconscious perverse activities'<sup>621</sup>. In terms of the stakeholder's belief in the reality of complete justice as a basis from which to pursue their interests, the distinction between perversity à la fetishism and neurosis adheres to the problem a neurotic stakeholder would have in committing to the necessary belief. This is because, where there is only partial repression of the avowed belief in fetishism, repression in cases of neuroses is more vigorous. This means it is less likely that the stakeholder would or could form the necessary belief because the unconscious material is unable to be rendered conscious and thus form the basis for the initial avowal, the 'I know' that precedes the 'nevertheless' in Mannoni's formulation, and why the perverse stakeholder needs the neurotic lawyer as complement.

'Belief can survive its own denial by reality', and, explains Gernerchak, 'belief can persist even after the believer has been disillusioned, and therefore knows the belief is false'<sup>622</sup>. This helps explain how belief can function in prescribed circumstances because it persists 'without the subject even knowing about it, simply because of a projection that allows someone else to believe in one's place'<sup>623</sup>. Trusts provide a good example of a bureaucracy that involves the type of split that is central to disavowal mimicked in the split between legal interest in the trustee and beneficial interest in the beneficiaries. The office of the trustee alone offers further examples of that 'someone else' able to believe in one's place that Gernerchak highlights.

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<sup>621</sup> Freud. 2001a,, pp.50-51

<sup>622</sup> Gernerchak, 2004a, p.43

<sup>623</sup> Gernerchak, 2004a, p.43

There are various modern instantiations of the office of trustee in which, to varying degrees, forms of disavowal that correspond to the notion of conscious partial repression that structures belief can be found. In the parlance of Equity jurisprudence, this disavowal and repression of belief takes different forms but is perhaps most notable in what Sarah Worthington refers to as 'restrictions on personal autonomy' in the office of the trustee (and fiduciary more generally)<sup>624</sup>. Doctrines of self-denial always already assume that trustees will commit breaches for personal gain, and therefore the loyalty basis of the fiduciary duty, which is also of note in the more specific field of trusts, is a good example of the source of such fictions<sup>625</sup>. Like other remedial modes that form part of Equity's trust jurisprudence, constructive trusts, for example, they interpolate a legal fiction predicated on the notion of conscience into the social transaction, but which point, I argue, to a formalization of disavowal and repression<sup>626</sup>. Irit Samet, for example, explains that:

By invoking this rich concept of loyalty the courts of equity advise fiduciaries that the serious commitment they took upon themselves calls for the adoption of an unusual disposition. A detached and purely instrumental approach to her relationship with the principal may get the fiduciary to abide by her legal duties. But this unique position of great power over other people, combined with an information gap that renders detection of abuse quite unlikely, *generates a temptation for wrongdoing*

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<sup>624</sup> Worthington, 2006, pp.127-156

<sup>625</sup> Worthington, 2006, p.131

<sup>626</sup> Echoing the early twentieth century American jurist Roscoe Pound, Margaret Halliwell describes the role of conscience vis-à-vis legal fiction in the following way: 'Because the general rules are based on abstraction and the disregard of the variable and less material element in affairs, the legal element is mechanical in its operation. Equity, or good conscience, operates as an element *via* the judicial modification or supplementing of existing rules of law by reference to current conditions and circumstances. It is antagonistic to the legal element because it is not technical but discretionary' (Halliwell, 2004, p.5)

*that can be very hard to overcome.* And this is true for an honest, well-intentioned fiduciary<sup>627</sup>.

As well as disavowal operating through these examples there is also an associated and important degree of compromise on the part of the stakeholder. The stakeholder, as trustee, for instance, disavows opportunities for personal gain. In doing so, however, she equally reaches a compromise regarding ways of continuing to enjoy the process, the bureaucracy, of which she forms so vital a part. This includes an enjoyment of the process that extends over the moral character of the trustee. Hence, trusteeship has long secured social and moral status for the stakeholder in lieu of personal financial gains<sup>628</sup>. At first sight, the compromise would appear a sole part of the function of disavowal. Both compromise and disavowal relate to the fundamental split in the subject that sets in motion the establishment of the fetish and the associated belief structure that supports it based upon the ambivalence of the subject's 'simultaneous acknowledgement and denial'<sup>629</sup>. Compromise warrants examination on its own terms insofar as it involves processes that can be distinguished from disavowal and thus serves to further define what disavowal is and why it is so important to the nature of fetishism. Freud introduces compromise in the following way:

It is not true that the child's belief in the female phallus remains unchanged after he observed a woman. He both retains this belief and renounces it; in

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<sup>627</sup> Irit Samet. 2014. Fiduciary Loyalty as Kantian Virtue. *Philosophical Foundations of Fiduciary Law*. Edited by Andrew S. Gold and Paul B. Miller. Oxford: Oxford University, p.140

<sup>628</sup> Discussing trusteeship during the nineteenth century Chantal Stebbings remarks that: '[t]rusteeship was an act of true affection and esteem, a demonstrable adherence to the social and moral codes, and as such it ensured the respect of the trustee's own social class. Moreover, since this ethos was reinforced and encouraged by the teaching of the Christian Church, a man falling short of the expected moral code would have to answer ultimately to God. In the context of the intense religious fervour in Victorian England, trusteeship was significant. It showed, no less, the moral standing of a man: to his family, his fellows, and to God' (Stebbing, 2002, p.9).

<sup>629</sup> Gernerchak, 2004a, p.37

the conflict between the force of the unwelcome perception and the intensity of his aversion to it, a compromise is reached such as is possible only under the laws of unconscious thought, the primary processes. In his psyche, yes, the woman still has a penis, but this penis is no longer the same thing as before. Something else has taken its place, has been appointed its successor, so to speak, and this now inherits all the interest previously devoted to its predecessor. But because the horror of castration has been immortalized in the creation of this substitute, this interest also becomes intensified to an extraordinary degree<sup>630</sup>.

This rich passage covers a lot of ground. The final sentence talks of immortalization and conveys the notion of a temporality that attaches to the fetish structure. Precisely what underscores immortalization and the subject's forward movement in time accompanied by their fetish will be dealt with in the following section on memorialization. Where compromise and disavowal can be more readily distinguished is in the processes following the retention and renouncement of belief. As discussed with regard to disavowal, there is in that process a necessary conscious stage of avowal whereby the subject has the knowledge they consciously turn away from, which maintains that belief is not derived from ignorance.

Compromise, as Freud suggests, is concerned with primary processes of repression at the level of the unconscious. There is no conscious stage of compromise, no compromise in ignorance, which ultimately structures the fetish object as a structure of ambivalence. The compromise is instead a direct result of a conflict in the psyche of the subject

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<sup>630</sup> Freud, 2006, pp.91-92



'between the force of the unwelcome perception and the intensity of his aversion to it'<sup>631</sup>. 'In sexual fetish worship', Böhme claims, 'things must always be kept in balance: the annihilation of identity by castration, which can no longer be expunged from the world (the sacrifice), must be represented in a new form, must mask itself as the love object that warrants all feelings of lust being focused on it'<sup>632</sup>. Accordingly, Böhme concludes, '[i]n the strict sense, the fetish is a *compromise* that is made in the unconscious between the fear of castration and the saviour of the phallus'<sup>633</sup>.

Again, the following section on memorialization will draw out the importance attributed to the 'new form' that emerges in fetishism, one which is apposite in the context of Equity fetishism in terms, notably, of post-Judicature mobilization in the wider field of Common law of complete justice. The type of procedure that John Sorabji summarizes as Chancery's ability to 'disapply procedural rules where abiding by them would frustrate its overriding objective of doing complete justice', which itself signals a form of compromise occurring within the machinations of civil procedure<sup>634</sup>. Compromise returns the discussion to unconscious conflicts over the universal nature of justice and fairness and a relationship to Equity at a corresponding unconscious social and institutional level. 'The fetish makes the unconscious fantasy that there is 'nothing but the phallus' possible', says Böhme, while at the same time and in adherence to compromise preserving, 'the repressed fantasy that there is such a thing as castration'<sup>635</sup>. Thus, Equity fetishism serves to maintain the structure of the capitalist fantasy of completeness, whilst also

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<sup>631</sup> Freud, 2006, p.91

<sup>632</sup> Böhme, 2014, p.319

<sup>633</sup> Böhme, 2014, p.319

<sup>634</sup> Sorabji, 2014, p.45

<sup>635</sup> Böhme, 2014, p.318

preserving a certain limit that serves as a reminder to the stakeholder that the fantasy is always already compromised.

Civil justice reform as a form of institutional compromise is, I argue, driven by capitalism and has been seen both in nineteenth century Judicature and more recently with the Woolf and Jackson reforms in the belief that this would lead to a more perfect and complete system of justice. Accordingly Judicature involved the creation of a form of civil justice in which Chancery's overriding objective of doing complete justice could be preserved without the corresponding problems that rendered 'its process both expensive and time-consuming'<sup>636</sup>. Equity fetishism emerged from the nineteenth-century reform agenda as a perverse and fantastical response to stakeholder demand for a different form of the civil justice system to the one that predominated during the earlier periods of capitalism, largely because the old system did not satisfy their desires. Despite the fusion of the court system and creation of a new and arguably more efficient way of doing civil justice, stakeholders did not achieve an infallible system of justice, and, indeed, the recent Woolf and Jackson reforms, whilst responses to changes in socioeconomic conditions under capitalism since the nineteenth century, are equally a testament to the impossibility of perfectibility. In Freudian terms, compromise *qua* civil justice reform necessarily continues because a 'particular and quite special penis' only resides in fantasy and will never manifest in reality.

#### 4. Memorialization

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Memorialization of Equity as an object is central to understanding its significance and value as a fetish in the contemporary civil justice system. A notable product of analyses

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<sup>636</sup> Sorabji, 2014, p.42

of Equity (including the present one) is the proliferation of historical references, each of which records and recounts a piece of Equity. All are complicit, therefore, although to varying degrees of a memorialization symptomatic of Equity fetishism. For instance, memorialization of Equity, as previously argued, is traceable to the effects of the nineteenth-century Judicature reforms which included securing the supremacy of Equity over Common Law and placing it, as Robert Pearce and Warren Barr maintain, 'on a statutory footing'<sup>637</sup>. Moreover, memorialization was cemented through subsequent pieces of Judicature legislation in 1925 and 1981, as well as via the Rules of the Supreme Court.

Memorialization of Equity via each stage of Judicature has looked to the past as much as to the future. The modern foundations of Equity's 'supremacy' continue to reside in the notion that its rules prevail over those of Common Law in the event of a conflict. This idea can be traced to the *Earl of Oxford's Case*, in which the Lord Chief Justice of the King's Bench, Sir Edward Coke, and the Lord Chancellor, Lord Ellesmere, failed to agree as to the status of Chancery injunctions respecting Common Law judgments. 'This jurisdictional civil war', Pearce and Barr claim, 'was finally ended in 1616, when James I issued an order in favour of the Chancery Court and the common injunctions'<sup>638</sup>. Despite attempts by Common Lawyers to reverse the outcome of the extraordinary intervention of the monarch by a Parliamentary Bill in 1690, which was eventually dropped 'when it was shown that it would make equity unworkable' and lead to injustice, 'the primacy of the Chancery Courts was well established by the end of the [seventeenth] century' and continued through the Woolf reforms at the end of the twentieth century as a further

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<sup>637</sup> Robert Pearce and Warren Barr. 2015. *Pearce & Stevens' Trusts and Equitable Obligations*. 6<sup>th</sup> Edition. Oxford: Oxford University Press, p.9

<sup>638</sup> Pearce and Barr, 2015, p.7

memorialization of the notion of complete justice as the normative means for achieving civil justice outcomes<sup>639</sup>.

As a key to fetishism memorialization involves a clear temporality which engages the subject in considerations of both the past and future in their structuring of the fetish object. Beginning with Freud we can see that the structure of the fetish requires a special something that was believed in once upon a time (in the past), but, crucially, does not want to be given up (in the present or in the future)<sup>640</sup>. As part of Freud's aetiology, the memorialization that helps establish the fetish is, as Böhme maintains, 'the perverse memorial to an archaic time in which there was a "*male* gender, but not a *female* one"'<sup>641</sup>. The fetish locks the subject into a specific temporality in which the past tense is forever tied to the future tense of the object in a cyclical yet historically contingent masking of loss *qua* castration. Or, more accurately, a re-signifying or re-symbolising that allows the meaning the object holds for the subject to endlessly (re)form in a chain of signification implies castration never occurred or has to occur in the fantasy life of the subject. 'It goes without saying', argues Böhme, 'that things also acquire meaning as memorial objects [...]' Here meaning is understood as an extra layer, a material patina. The cultural part of things is put on them like a dress, which then gradually becomes a second skin. This becoming historical and biographical of things makes them into archives of memory, in which individual people and collectives find security'<sup>642</sup>.

With regard to the interrelation between Equity and Chancery in the structure of Equity fetishism, memorialisation involves a coalescence of both materialities and temporalities. The Court of Chancery represented and represents an archive of the materiality of Equity;

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<sup>639</sup> Woolf, 1996; Pearce and Barr, 2015, p.7

<sup>640</sup> Freud, 2006, p.91

<sup>641</sup> Böhme, 2014, p.322

<sup>642</sup> Böhme, 2014, p.81

Equity sustained through an architecture of stone, bricks and cement. Whilst the name of Chancery is carried forward, as a homology, through time on the signifying chain as the "Chancery" Division. Therefore, a materiality (the weight of the stone, brick and cement) associated with the long-dead court remains part of how Equity continues to be interpreted and understood. The divisional preservation of Chancery was thus, I argue, no accident and preservation of the name post-Judicature deliberately took account of and memorialised that which Equity had been, but, importantly, could not close-off what Equity was to become, notably a commercially astute and adaptable mode of civil justice capable of bearing more children<sup>643</sup>. 'The essence of institutional equity is the creation of a special court, distinct from the courts administering the general law, having the power to modify or correct the general law', state Bryan and Vann, although, as they further maintain in full acknowledgement of the idea of memorialization, 'the paradox of institutional equity is that it is premised on the existence of a court which no longer exists'<sup>644</sup>.

Due to the withering status of the Court of Chancery by the time of its closure, preservation also had to account for what Equity or civil justice more generally must never be again. Not least because a return to costliness and inefficiency of the magnitude attributed to the Court of Chancery by stakeholders and reformers during the nineteenth century would contradict the spirit of capitalist ideology that had made the case for systemic reform of civil justice a necessity and a reality. Accordingly, memorialization in the case of Equity fetishism reflects stakeholder desire for complete justice, but also of

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<sup>643</sup> That Equity is said to not be past the age of childbearing is yet another reference to its flexibility, insofar as it is able to bring forth new rules and principles as required by the nature of given situation. Lord Denning was a famous proponent of the idea in relation to his "new model" constructive trust in *Eves v Eves* [1975] 1 WLR 1338 at 1341.

<sup>644</sup> Bryan and Vann, 2012, p.4

certainty and stability in terms of the overarching procedural functionality of the courts. A desire driven by stakeholder anxieties regarding the loss of ground on which one's certainty has been staked, the same ground from which the fetish emerges<sup>645</sup>.

The fetish captivates the subject in a constant present that parallels an otherwise evolving experience, and around which are wrapped the arms of the past and future. Gravestones, war memorials and other non-functioning objects that, insofar as they are made from organic or natural materials, decay (are subject to forces of entropy), are examples that give the subject a sense of fixity and immovability. The tended grave in particular, which is visited, cleaned, repaired and maintained, is an example of the captivity of living subjects by static objects and by stasis as such. Engaged in memorializing, these subjects affect a constant return to the *once upon a time*. In lieu of the actual reincarnation of the body in the grave, this re-enactment of the moment or event signalling the living subject's loss can be represented by the cleaning and renewal of the headstone.

To *tend* is, therefore, to ritually institute forms of renewal and a sense of return to an earlier point in time where the special object remained, at least symbolically, intact. Meaning is then translated into the present and, indeed, projected into the future, raised up and celebrated. A process that is succinctly put in the infamous memorialization of the war dead: *lest we forget*. 'This is always about overcoming death or the dead (things) that mark themselves as absent and a void', argues Böhme, '[f]etishism can thus be described as an animating force that is taken from a memory that masks its origin and yet

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<sup>645</sup> As Kevin and Susan Francis Gray maintain with regard to real property (land), although their point is based on a bias towards the alienation of property that is shared more generally across all property law in England and Wales insofar as it is geared to commercial interests: 'The English law of real property [...] confirms, in a mantra-like formula, that '[i]n matters relating to title to land, certainty is of prime importance. To permit any uncertainty as to the impact of land transactions on various subsidiary claims is to place an intolerable burden on the process of land transfer and the long-term planning of land use' (Gray and Gray, 2009, p.136)

in the fetish becomes an event in the here and now'<sup>646</sup>. Central to this aspect of memorialization are, I claim, also aesthetic and atmospheric considerations. As such, it is important to explain how these considerations further define fetishism.

That fetishism has an aesthetic dimension is axiomatic. Indeed, Böhme posits the relationship between fetishism and aesthetics as prehistoric and fundamental to the human condition itself<sup>647</sup>. Fetishism, Böhme maintains, apprehends basic human considerations of and concerns with beauty and ugliness, pleasure and aversion<sup>648</sup>. The suggestion is that the ethnographic and cultural anthropology of fetishism can be traced to a set of aesthetic values, which far from being fixed are in fact evolving with human experience and reason in the form of, for example, fashions, tastes, techniques, institutions and so on. Considered in light of Freud's aetiology, the relationship of aesthetics to fetishism can be linked to the substitutional value as well as the substantive qualities and characteristics of the fetish object itself. The substantive *thingness* of the fetish speaks to the notion that fetishism necessarily involves reification and a freezing or stalling, temporally speaking, at the point of the fragmentation and loss of the primal object of desire. Hence the purpose of the fetish, as Freud states, is to 'prevent this loss from occurring', something that goes to the heart of memorialization as a key feature of fetishism<sup>649</sup>. Moreover, the fetish generates enjoyment for and happiness in the subject because it is not just any object but 'a specific and very special one'<sup>650</sup>. Integral to its ability to sustain belief, therefore, the fetish possesses for the subject an aesthetic quality that makes it special.

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<sup>646</sup> Böhme, 2014, p.312

<sup>647</sup> Böhme, 2014, p.82

<sup>648</sup> Böhme, 2014, p.82

<sup>649</sup> Freud, 2006, p.91

<sup>650</sup> Freud, 2006, p.90

In being the special thing that provides enjoyment for the subject and makes him or her happy, the substantive aesthetic quality of the fetish equally exists in or rather generates a certain atmosphere for the subject. Accordingly, to sustain belief there remains extant for the duration (life) of that belief in the fetish a commitment to a certain atmospheric (as well as aesthetic) quality, making it a vital component in structuring the fetish as such. For example, the genital construction performed by the little boy apropos his mother's special phallus is, for Freud, clearly more than just an aesthetic concern – what may be considered as a concern for the penis as an aesthetic functional object itself, as well as for the functional integrity of that penis vis-à-vis the threat of castration<sup>651</sup>. What is special about the object able to fulfil this genital construction can be directly traced to an atmosphere that surrounds it, what Böhme refers to as 'the matrix of beauty', which at once 'arouses pleasure or dislike, attraction or revulsion' in the subject<sup>652</sup>.

Atmosphere in that sense, akin to a symptomology, manifests aesthetic effects which generate their own materiality<sup>653</sup>. Moreover, atmosphere can involve something more subtle such as a gesture made in and through space, which describes or determines some form of causal outcome or consequence. The historical view of Equity as a court of conscience signal juridical gestures of discretion and contemplation that illustrate an atmosphere of justice on the terms described here. An atmosphere of civil process in which the court seeks less to know the defendant's conscience, than for the defendant to have self-regard for their own conscience. Or, rather, for the court to reach a point at

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<sup>651</sup> Freud clearly integrates aesthetic considerations into his discussion of fetishism both in the 1927 essay ('Fetishism'), and shortly after in his short 1938 essay entitled, 'The splitting of the ego in defence processes' (Freud, 2006, pp.64-67)

<sup>652</sup> Böhme, 2014, pp.81-82

<sup>653</sup> For example, in *Observing the Erotic Imagination* Robert J. Stoller describes what he calls 'erotic vomiting' (Robert J. Stoller. 1985. *Observing the Erotic Imagination*. New Haven: Yale University Press, pp.157-164)



which it is able to interpolate a fiction of conscientiousness into proceedings in order, for instance, to guarantee the legitimacy of property rights claims.

The Aesthetic atmosphere produced by the fetish always derives from a position of subjective desire. It is not something that can be objectively or scientifically measured. That does not mean that the particular qualities of a fetish that trigger enjoyment and happiness for the subject cannot be relayed or communicated in some form to others. Take, for example, the deeply affective aesthetic representations of the Court of Chancery during its demise in the nineteenth century. And in particular the reformist portrait painted by Charles Dickens in *Bleak House* that deliberately cast Chancery cloaked in fog as an arcane, esoteric and, most importantly, dysfunctional institution<sup>654</sup>. The problems surrounding Chancery were, like Dickens' fog, all-pervasive and much debated by the nineteenth-century reformers. What is more, the problems were cast as much in aesthetic as ethical terms. The role commentators such as Dickens had in shaping perceptions of civil justice system were important therefore not least because they helped determine the fate of Chancery as a material place and an idea. With the demise of Chancery, of course, came the reconfiguration of the system as a whole, as Gary Watt maintains: 'Dickens added high-grade fuel to the existing fire of chancery law reform'<sup>655</sup>. And as part of an aesthetic commitment the aim of reform was to satisfy, if not exactly a cultural need for the (fetid) atmosphere of Chancery, then at the very least the need for an acknowledgement and appreciation of an atmosphere from which something

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<sup>654</sup> As an example from Dickens shows:

On such an afternoon, some score of members of the High Court of Chancery bar ought to be – as here they are – mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of Equity with serious faces, as players might. (Charles Dickens. 2011. *Bleak House*. London: Penguin Classics, p.14)

<sup>655</sup> Watt, 2012, p.56

functional could be salvaged, namely Equity<sup>656</sup>. Together with an aesthetic discourse, therefore, atmosphere describes how belief in Equity could ultimately be shaped by a memorialization of Chancery despite its ruin and closure.

Complete justice post-Judicature (and post-Chancery) involved the interlinked desires for concurrency with the Common Law and for the procedural approach of Equity to prevail. Moreover, Chancery remained an important part of civil justice, not only as an homology linking the name of the old court to the new, post-Judicature division, but, rather, in a ghostly and memorial form. When Anthony Mason talks of Equity in the contemporary Common Law world in which he focuses quite specifically on 'equity's incursions into the area of commerce', he, therefore, insists on 'the distinctive concepts, doctrines, principles and remedies which were developed and applied by the old Court of Chancery, as they have been refined and elaborated since'<sup>657</sup>. Mason's 'old' Court of Chancery is a jurisprudential *archive* maintained for practical and systematic reasons under the heading of the post-Judicature Chancery Division, but equally a certain persistent spectre of Chancery that continues to haunt the moment of civil justice adjudication.

What was imputed by reformers and stakeholders to be worthwhile and good about Equity and necessary to preserve and memorialize post-Judicature was thus necessarily fashioned from the atmosphere of Chancery and, indeed, still is or was until at least the end of the twentieth century; it was a concurrent vision of Equity that signalled the dominance of complete justice. Mason describes, once again, the nature this dominant form of procedure took as the 'underlying values of equity centred on good conscience',

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<sup>656</sup> Jean Baudrillard. 2005. *The System of Objects*. Translated by James Benedict. London: Verso

<sup>657</sup> Mason, 1994, p.245 & p.238

that, 'will almost certainly continue to be a driving force in the shaping of the law unless the underlying values and expectations of society undergo a fairly radical alteration'<sup>658</sup>. Mason does not expand on the 'underlying values and expectations of society' he refers to, but the juridical-economic *status quo* of capitalism underpinned by the civil justice system is not an unreasonable implication. For Sorabji, the shift in underlying values and expectations came not in the form of a social so much as a juridical alteration. Namely, a theory of civil justice formulated at the end of the twentieth century by the Woolf reforms based on the determination of an 'overriding objective', which echoed Benthamite utilitarianism and promoted economy and efficiency as necessary traits of the litigation process<sup>659</sup>. From the point of view of this thesis it is interesting that both Mason and Sorabji imply that the same forces are at work in shaping civil justice - economic reason and capitalist ideology. Moreover, that neither name capitalism but instead rely on euphemism is, I argue, testament to the depth of capitalist ideology; as Jodi Dean argues, in getting us to think only in terms of capitalist logics of, among other things, competition and efficiency<sup>660</sup>.

Equity fetishism is indelibly marked by Equity's (former) relationship to the Court of Chancery. What is placed in brackets in the previous sentence is necessarily done so in order to highlight the temporality at play, and that, actually, to consider the relationship between Equity and the Court of Chancery to be 'former', finished or in the past is, as discussed above, inaccurate. Memorialization of the (dead) Court of Chancery occurs in the (living) Chancery Division as a homology (in name), but also as a 'tending of the graves'. An analogy which adheres to Mason's suggestion that Equity constitutes not only

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<sup>658</sup> Mason, 1994, p.258

<sup>659</sup> Sorabji, 2014, p.148-150

<sup>660</sup> Jodi Dean, 2012, p.73

a reference to the old Court but the constant refinement and elaboration since of the rules and doctrines originated in Chancery. Variations of the memorialization on the signifying chain of Chancery ('tending of the grave'), in terms put forward by Mason, naturally manifests in judicial statements. For example, Bagnall J. in *Cowcher v Cowcher* [1972], a case concerning matrimonial property, in which he stated that:

In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view that is not injustice. I am convinced that in determining rights, particularly, property rights, the only justice that can be obtained by mortals, who are fallible and not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity, the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle<sup>661</sup>.

For Bagnall J. Equity was what the Court of Chancery *did* until Judicature and any development thereafter belonged only within the margins and cognizance of the Common Law<sup>662</sup>. With reference to a complete system of civil justice, it was important that

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<sup>661</sup> *Cowcher v Cowcher* [1972] 1 WLR 425 at 430. In a notable response to Bagnall J in *Eves v Eves* [1975] 1 WLR 1338 at 1341, a judge on the more creative side of the spectrum, Lord Denning, infamously proclaimed that: 'Equity is not past the age of childbearing. One of her latest progeny is a constructive trust of a new model. Lord Diplock brought it into the world [in *Gissing v Gissing* [1971] AC 886] and we have nourished it'.

<sup>662</sup> Following a broader school of thought on the integration of Equity and Common Law that was led until recently by Peter Birks, and which continues to live through the development of other bodies of law, namely the law of restitution and unjust enrichment, Sarah Worthington makes the point, forcibly, that: 'Integration is possible. Integration is also desirable in the interests of better justice. It facilitates the aim of treating like cases alike. It also facilitates the sort of *rational evolution* of the law that is only possible if courts can draw distinctions based on meaningful differences rather than accidental jurisdictional divides' [my emphasis] (2006, p.335)

absolute coherence between the ways and means of Common law and Equity be sustained. The type of dogmatic insistence demonstrated by Bagnall J is summed up by Sarah Worthington who has equally managed to perform the remarkable (fetishistic) task of writing in-depth and with exceptional clarity about Equity, only to conclude that, as a body of law, it has no rational place in the future of the Common Law system of civil justice. '[H]istory cannot', Worthington argues, 'go on to convincingly vindicate what is unquestionably a counter-intuitive choice [...] Comprehensive, rational integration of Common Law and Equity doctrines appears to be the only defensible modern option in pursuing principled legal development'<sup>663</sup>.

The integration that Worthington advocates is arguably a form of memorialisation *par excellence* in respect of Equity fetishism. This is because its aim is to thoroughly dissolve Equity as a body of laws into the Common Law so as to, effectively, make it unclear to stakeholders where one law begins and another ends<sup>664</sup>. Whilst at the same time preserving Equity as a distinguished and distinguishable other of the Common Law. '[C]omprehensive doctrinal integration must surely be the grand plan for *Equity and the Common Law*', states Worthington, 'it is certainly the best plan for *Equity in the common law*' [my emphasis]<sup>665</sup>. Whether this is a typographic error on the part of the author or publisher, it nevertheless remains the case even as Worthington seeks to shift Equity from a parallel status with the Common Law ('and'), to an integrated position of subservience 'in' the Common Law, it is Equity that remains capitalised, remains supreme, and thus ultimately prevails as the fetish object of complete justice. As a

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<sup>663</sup> Worthington, 2006, p.335

<sup>664</sup> Peter Birks remarks on the ultimate failure to achieve this: 'Although the institutional separation of law and equity finally came to an end in 1871, the inheritance of intellectual duality has proved difficult to overcome' (Birks, 2005, p.292)

<sup>665</sup> Worthington, 2006, p.336

commentary on the victory of Equity over Common Law that the implementation of complete justice post-judicature signifies, Worthington's slip, whether intended or not, is, therefore, instructive.

## 5. Summary

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Having outlined three of the major features of fetishism in Freud's mature theory of the concept, it is now possible to summarize the notion of Equity fetishism before moving on. Fetishism as discussed, especially regarding disavowal, is not a function restricted to the level of the unconscious. Instead, fetishism occurs in plain view, so to speak, as normative conscious (real) knowledge, which, by constructing mechanisms of belief, contradicts unconscious desires that manifest in the subject as unwelcome perceptions<sup>666</sup>. Hence, different manifestations of fetishism, including Equity fetishism, do not amount to mere fantasy but maintain a basis in reality that allows them, as is the case with complete justice, to invite objective evaluation. That is, to appear to be rooted in objective reason rather than subjective desire. As Gernerchak maintains: '[T]he mystery of fetishism is that the closed circuit of desire and the belief in the satisfying nature of the object may be shattered, and consciously so, but the belief in the exclusive fulfilling object remains'<sup>667</sup>.

As a condition of capitalist society in which ECJ corresponds to 'the institutionalized structuring of social consciousness so as to create social reality as a comprehensive system of objective illusion', Equity fetishism manifests in the fixation of stakeholders on 'empty signs rather than material substance'<sup>668</sup>. Equity fetishism involves the production of more profound symbolic meanings. This takes the form, primarily, of sustaining belief in the fantasy of a complete and thus certain system of civil justice, predicated on the

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<sup>666</sup> Gernerchak, 2004b, p.243

<sup>667</sup> Gernerchak, 2004a, p.41

<sup>668</sup> Gernerchak, 2004a, pp.24-25

post-Judicature unity or fusion of Common Law and Equity. In this context, Equity fetishism sustains stakeholder belief in, for example, the coherence and rationality of the private property order in particular and capitalist ideology in general.

‘The fetish’, says Gernerchak, ‘not only serves to *disavow* a lack and assert a presence, but as well to *incarnate* a lack, to simultaneously veil and unveil an essential absence’<sup>669</sup>. Reemphasizing aspects of the discussion above on memorialization it is argued here that, as a product of the nineteenth-century reform agenda, Equity fetishism is indelibly marked by the Court of Chancery. That is, by a particular site of loss and negativity from which the notion of complete justice continues to speak. ‘At the heart of fetishism, both on the side of the fetish object and the fetishistic subject’, argues Gernerchak, ‘there is an internal contradiction between brute materiality and evanescent dissimulation, essence and appearance, which makes it flow’<sup>670</sup>. As the exclusive *material embodiment* of Equity, that is, the physical site of the practice and dissemination of Equity’s ideas and reason, and thus, largely, the source and repository of the language of Equity, Chancery remains central to the notion and practice of Equity fetishism post-Judicature.

In whatever context Equity arises, language is key. As a feature of Equity fetishism the means of testifying to its ‘enduring presence’ occurs not only through the evocation of Chancery, in the homology between Court and Division, but also in the language of Equity<sup>671</sup>. The centrality and solemnity of the language of conscience in shaping the nature and practice of complete justice, including the oft-used reflexive, unconscionability, has since the time of John Selden’s *Table Talk* assumed the very

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<sup>669</sup> Gernerchak, 2004a, p.38

<sup>670</sup> Gernerchak, 2004a, p.13

<sup>671</sup> Gernerchak, 2004a, p.38

particular form of a foot fetish<sup>672</sup>. ‘We focus on language’, states Geoffrey Galt Harpham in his general analysis of language-as-fetish, ‘as a way of reassuring ourselves, albeit indirectly, of our special place in the order of things, our singular endowments and high destiny’, a statement which speaks to the status and degree of absoluteness afforded to justice, flexibility (adaptability), and fairness, as well as the various ways that Equity aims to apply these in various contexts for stakeholders<sup>673</sup>.

Equity fetishism is key to the fantasy of the need for legal certainty (among many other fantasies) that capitalism promulgates in order to satisfy the stakeholder and guarantee the sanctity of economic reason. The fantasy of legal certainty engages and captivates stakeholders. It makes them want to invest, invite risk and competition and ultimately litigate over property rights and interests. Underlying this fantasy (what the fantasy and fetishism mask) is the message capitalism wishes to communicate to the stakeholder: that castration is avoidable and complete satisfaction possible. And communicating this message involves the language of Equity as it is recorded in case-law, legislation and other modes of juridical discourse that give credence to a culture of rights and the broader notion of a private property order<sup>674</sup>.

Through language Equity structures belief in complete and certain justice. As a desirable legal end certainty is not exclusive to Equity, but to the concurrent system of civil justice

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<sup>672</sup> Böhme, 2014, p.324; Žižek, 2008, p.238.

Selden famously remarked:

Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. ‘Tis all one if they should make the Standard for the measure, we call a Foot, the Chancellor’s Foot; what an uncertain measure this would be? One Chancellor has a long Foot, another a short Foot, a Third and indifferent Foot: ‘Tis the same thing in the Chancellor’s Conscience. (Selden, 1856, p.49)

<sup>673</sup> Harpham, 2002, p.66

<sup>674</sup> Where the language of Equity is concerned as a means of penetrating or engaging the mystique of Equity, there have perhaps been no more desiring stakeholders than those members of the Chancery Bar who, in the lead up to Judicature and throughout the nineteenth century, fought so vociferously to keep Equity distinct from the Common Law, and did so predicated on their special knowledge of that jurisdiction.



as a whole. Certainty is itself contingent, therefore, upon the integrity of the whole. In the notion of certainty, it is possible to discern yet another dimension of Equity fetishism with regard to the uncastrated fantasies of capitalism. Equity fetishism turns upon, as Valerie Kerruish claims with regard to 'rights fetishism', certainties in '[l]egal practice of deciding particular cases by general rules, of coercive enforcement of those decisions, and of claiming that such judgments and their enforcement are objectively or uniquely right'<sup>675</sup>. As a consequence, Equity fetishism allows thoughtful subjects to lose themselves 'in and to their own product: their thought and their laws'<sup>676</sup>.

Finally, it ought to be clear by now that this thesis maintains that complete justice demanded by the stakeholder in Equity is never the thing as such (is never complete), but only ever a banal instant manufactured by a neurotic legal counterpart in and by language to defeat a negativity, a lack, at the core of the stakeholder. It is more accurate to think of Equity fetishism therefore as a totalizing and fantastical means through which civil justice appears complete in the eye of the stakeholder, as that which the stakeholder actually seeks, when they seek justice *in* Equity. Civil justice contingent upon the language of Equity, even where that engenders a closed and discrete field of knowledge and expertise, only serves to further alienate the stakeholder, insofar as the language is tied to an already alienating process of property.

The fetishization of the language of Equity, as a more precise description of how Equity fetishism actually manifests, disguises endless chains of signification that are always inconclusive and which reveal in the stakeholder a certain commitment to and investment in the materiality of the sign. But a sign mistaken for complete justice,

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<sup>675</sup> Valerie Kerruish. 1991. *Jurisprudence as Ideology*. London: Routledge, p.194

<sup>676</sup> Kerruish, 1991, p.194

certainty or both. Language lives at the heart of what it means for Equity fetishism to prevail, rather than mere Equity<sup>677</sup>. And, accordingly, for Equity fetishism to continue formatting scenes of complete justice in the field of property on behalf of stakeholders who need to believe, not only in the fantastic possibility that justice is complete and will legitimize their rights to property and thus make them good economic subjects under capitalism, but that the primal loss associated with castration never occurred and does not apply to them.

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<sup>677</sup> In its prevailing, the centrality of Equity to legal consciousness established by Lord Ellesmere in the *Earl of Oxford's Case* which continues in the present via s.49(1) of the *Senior Courts Act* 1981 marks the temporal record and legal consciousness of law in England and Wales.

# Chapter 8

## *Neoliberalism & Equity Fetishism: An Analysis of the Contemporary Capitalist Moment in Civil Justice*

The central values of civilization are in danger. Over large stretches of the Earth's surface the essential conditions of human dignity and freedom have already disappeared. In others they are under constant menace from the development of current tendencies of policy. The position of the individual and the voluntary group are progressively undermined by extensions of arbitrary power. Even that most precious possession of Western Man, freedom of thought and expression, is threatened by the spread of creeds which, claiming the privilege of tolerance when in the position of a minority, seek only to establish a position of power in which they can suppress and obliterate all views but their own.

The group holds that these developments have been fostered by the growth of a view of history which denies all absolute moral standards and by the growth of theories which question the desirability of the rule of law. It holds further that they have been fostered by a decline of belief in private property and the competitive market; for without the diffused power and initiative associated with these institutions it is difficult to imagine a society in which freedom may be effectively preserved<sup>678</sup>.

### 1. Introduction

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During this chapter Equity fetishism will be discussed in light of the contemporary capitalist age, which is understood here to correspond with so-called *neoliberalism*. In the time between Judicature and the *Senior Courts Act* 1981 the role and place of Equity has often been restated in the civil justice system. Since then significant reform programmes in England and Wales have further shifted the onus of civil justice, I argue, towards an alignment of economic principles to Equity's deontological imperative, or rather, *vice versa*. In his final report on access to justice Lord Woolf remarked that civil justice should be *inter alia* 'just in the results it delivers; fair in the way it treats litigants; offer appropriate procedures at a reasonable cost, and be responsive to the needs of those

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<sup>678</sup> Founding statement of the Mont Pelerin Society, Switzerland, April 8 1947. The founding members included Friedrich Hayek, Ludwig Von Mises and Milton Friedman. [Online] Available at: <https://www.montpelerin.org/statement-of-aims/> (accessed 4 May 2017)

who use it'<sup>679</sup>. On the one hand, the Woolf Reforms echo the sorts of debates that informed the Judicature reforms during the nineteenth century, where cost and speed, especially where Chancery was concerned, were key themes and significant problems that needed to be solved. On the other hand, however, the notable alignment of principles of fairness and justice with economic injunctions for civil justice to perform with greater efficiency, flexibility (adaptability and responsiveness), and cost-effectiveness are entirely contemporary justifications made within and native to neoliberal capitalism<sup>680</sup>. In that sense, the Woolf reforms accord with a notion and ideal of common sense justice native to neoliberal reason. We have already explored the impact of Chicago School and the law and economics of Richard Posner, and there is a strong argument that will be made here that reforms to civil justice, conducted by the likes of Lord Woolf, whilst redolent of the nineteenth-century project to tidy up the legal field 'littered with the most venerable survivals' from bygone ages, is most recognisable as a further fusion of law and economics 'such that 'efficiency' is made 'a proxy for justice'<sup>681</sup>.

This chapter will describe two main areas. Firstly, the place of Equity and civil justice within neoliberal thought. This will involve considering the impact of neoliberalism on notions of complete justice that has been described previously as the basis for selfishness in contemporary civil litigation in defence of private interests<sup>682</sup>. Secondly, Equity fetishism will be considered in light of the emphasis placed on strategizing within neoliberal capitalism. That is, the propensity for stakeholders to combine various social,

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<sup>679</sup> Woolf, 1996

<sup>680</sup> The role of flexibility has been covered in depth in the earlier chapters of this thesis. In relation to the place of flexibility within contexts dominated by economic and commercial principles, in particular, see: Millett, 1998.

<sup>681</sup> Davies, 2017, p.87

<sup>682</sup> Jolowicz, 1983

political, moral, economic and legal options into strategies in support of, among other things, selfish interests.

As part of this strategizing, there is I argue a reliance on fantasies of efficient commutative justice capable of salving the stakeholder-as-engaged economic subject within neoliberal capitalism. Fantasies that turn on ECJ, but which now also embody models of adjudication such as Alternative Dispute Resolution (ADR) that extend, and have thus rendered porous, traditional boundaries of civil justice 'as a way of resolving disputes that does not require the use of court resources'<sup>683</sup>. Whilst this thesis has identified Equity fetishism as broadly related to the notion of complete justice, in order to describe Equity fetishism under neoliberalism, this chapter will further examine unconscionability as a specific symptom of the demand placed on the subject by neoliberal capitalism to be flexible and agile. That is, how unconscionability *qua* flexibility itself assumes the status of fetish, and stakeholders engaging under the aegis of neoliberal thought in both contexts of high-level economic risk and everyday bargaining come to rely on it both conceptually and materially in civil justice events, including forms of adjudication both in and out of court.

## 2. The law of neoliberalism

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The drift towards socialist economic policies as an attenuation of capitalism during the first half and middle of the twentieth century in Western capitalist societies produced programmes such as the New Deal in the United States and the Welfare State in Great

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<sup>683</sup> Adam Gearey, Wayne Morrison and Robert Jago. 2009. *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions*. London: Routledge, p.383; see also: Thomas O. Main. 2005. ADR: The New Equity. *University of Cincinnati Law Review*, Vol. 74, pp.329-404; Carl F. Stychin and Linda Mulcahy. 2007. *Legal Methods and Systems*, 3<sup>rd</sup> Edition. London: Sweet & Maxwell; Sheela Rai, Sayak Chandra and Souvanki Mullick. 2008. ADR Processes: A Jurisprudential Understanding. *The Icfai University Journal of Alternative Dispute Resolution*, Vol. 7, No. 4, pp.74-91

Britain. But these have arguably been politico-economic aberrations in government policies otherwise caught within the ambit of capital since the late eighteenth century. It is important to note that the monumental crises of capitalism, for example, in the form of the 1929 'Wall Street crash' and the subsequent Great Depression in the United States that American historian Howard Zinn claims were symptomatic of 'a sick and undependable system', reveal that capitalism is inherently configured to reach points of logical impasse and crisis<sup>684</sup>. Fantasies of complete justice are, therefore, vital to stakeholders if they are to maintain belief in an unstable and illogical form of social organization, and a parallel belief that capitalism holds the key to endlessly deferring the trauma of castration.

During the middle of the twentieth century the Mont Pelerin Society was established by leading academics of the time and thinkers from a variety of different fields, whose founding statement quoted at the start of this chapter laid the foundations for a resurgence of late nineteenth century neo-classical economics and the desire to disseminate economic reason across Anglo-American post-war capitalist societies seen as being under threat from socialism<sup>685</sup>. As the epigraph above shows, central to the conceptual foundations of neoliberalism are juridical and, it will be argued, fetishistic concerns that are captured in the two emphasized passages: 'the desirability of the rule of law' and 'belief in private property'. What the analysis later in this chapter will aim to describe therefore is how Equity fetishism is translated into the contemporary socioeconomic and legal moment, enabling stakeholders to, to paraphrase Sir Henry

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<sup>684</sup> Zinn, 1996, p.378

<sup>685</sup> Akin to the example of the Woolf reforms, or rather as evidence of how those reforms fit the sort of agenda proposed by the Mont Pelerin Society, what is recounted here is a tension between past and future practices (social, economic, political and legal) existing within the boundaries of economic reason.

Maine, 'strive to recover a lost perfection' and sustain their fantasies of uncastrated unity and through private property, wealth and complete civil justice<sup>686</sup>.

This train of thought reflects the work of Frederick Hayek as one of the major architects of law's place in neoliberal thought, and which led him to make the case for new super-charged competitive and market-driven form of capitalism in his infamous diatribe against the perils of socialism, *The Road to Serfdom*<sup>687</sup>. It is not unreasonable given the sheer amount of times he references the notion in his work to suggest that the heart of the matter for Hayek was competition and the strategic nature of competitive practices in particular. His furious defence of competition was directed, not only against the centralising tendencies of economic organization that he regarded as key to socialism but equally against the prevailing threat of the capitalist who would promote the eventual collapse of free markets into a state of monopoly<sup>688</sup>.

Hayek's reimagining of capitalism gave particular prominence to the legal system in ensuring the legitimacy and effectiveness of the competitive market structure that he desired and in large part predicted. 'The functioning of competition not only requires adequate organisation of certain institutions like money, markets, and channels of information', argued Hayek, 'but it depends above all on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible'<sup>689</sup>. In Hayek's scheme, as well as for commentators and stakeholders of libertarian capitalism such as Ludwig Von Mises and Milton Friedman that formed part of what Mirowski calls 'the Neoliberal Thought Collective (NTC)', law (and we must include Equity within that definition when discussing a Common Law

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<sup>686</sup> Maine, 1972, p.41

<sup>687</sup> F. A. Hayek. 2001. *The Road to Serfdom*. London: Routledge Classics

<sup>688</sup> Hayek, 2001, p.42

<sup>689</sup> Hayek, 2001, p.39

system) had a very particular role to play<sup>690</sup>. Moreover, civil justice that, akin to the stakeholders who relied upon it, was always already subordinate to a need, contained deep within the internal logic of neoliberalism, for risk to be assumed and competition to flourish. All forms of law and legal institution within a neoliberal superstructure predicated on so-called 'free-market' competition, that is, maximum deregulation and minimum state intervention, as the primary mode of socioeconomic organization had to achieve one overriding aim: efficient and effective competition and more risk as the essential platforms for maximum capital accumulation and profit<sup>691</sup>.

Hayek's vision prompted a system of law and within it civil justice that must be agile, flexible and creative. All the features idealised in Hayek's justice system have, at one time or another, been seen as particular attributes of an Equity jurisdiction that 'balances out the need for certainty in rule-making with the need to achieve fair results in individual circumstances'<sup>692</sup>. Indeed, Equity offers a particularly valuable lens through which to view the work of Hayek and in particular the basis of the neoliberal programme he ultimately unleashed. And whilst Hayek does not expressly discuss Equity, he comes very close to ECJ in his notion of the 'rules of just conduct'. In particular, he attaches this notion of conduct to what he calls 'end-independent rules which serve the formation of a spontaneous order' (the potent concept behind the proliferation of free-market liberty), which are contrasted with 'end-dependent rules of organization', namely the basis of the type of unfavourable and inflexible central economic organization found under socialism that relies on high levels of government intervention and control of the economy through robust regulation<sup>693</sup>. Rules of just conduct as end-independent rules are, like the

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<sup>690</sup> Philip Mirowski. 2013. *Never Let A Serious Crisis Go To Waste*. London: Verso

<sup>691</sup> Hayek, 2001, p.39

<sup>692</sup> Hudson, 2017, p.4

<sup>693</sup> Hayek, 2013, p.197



discretionary attributes of ECJ and, more specifically, the bases upon which unconscionability is applied, 'the *nomos* which is at the basis of a 'private law society' and makes an Open Society possible'<sup>694</sup>.

For Hayek private law as *nomos*, as a modality of individual utility and obligation, was necessary in order to foster independence and just conduct able to prevent stakeholder conflict and facilitate co-operation 'by eliminating some sources of uncertainty'<sup>695</sup>. As I have described, the private law domain, especially with regard to property, is one in which Equity is aimed at facilitating precisely this type of conduct through ECJ, as well as through the finer detail of its principles, doctrines and remedies. Equity cannot, as is the case with any laws, entirely eliminate uncertainty, but with regard to the property rights framework and the private property order, can, echoing Hayek, 'create certainty [...] to the extent that they protect [proprietary] means against the interference by others, and thus enable the individual to treat those means as being at his disposal' [my addition]<sup>696</sup>.

### 3. Equity within neoliberal thought

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Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets [...] In so far as neoliberalism values market exchange as 'an ethic in itself, capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs', it emphasizes the significance of contractual relations in the marketplace. It holds that the social good will be maximised by maximising the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market<sup>697</sup>.

Neoliberalism is not considered here as an abstract mode of social organization but an outgrowth of economic reason and in particular a set of *strategies* that broadly follow and

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<sup>694</sup> Hayek, 2013, p.197

<sup>695</sup> Hayek, 2013, p.204

<sup>696</sup> Hayek, 2013, p.204

<sup>697</sup> Harvey, 2005, pp.2-3

adhere to the ideology of capitalism. Yet the strategic nature of neoliberalism is also that which ultimately differentiates it from classical forms of capitalism, and places requirements on stakeholders to imaginatively redefine themselves and society as a whole as economic ecosystems<sup>698</sup>. Central to neoliberalism are interpellated economic subjects (stakeholders) who, despite subtle shifts in the exercise of economic reason that neoliberalism entails nevertheless remain entirely and unreservedly focused on achieving the aims that capitalism promises. These stakeholders strive for individual accumulation (profit and wealth) and the reproduction of class power through the variegated ways and means of commercial and personal self-interest and entrepreneurialism, as we might find in traditional instances of capitalism. As a species of rather than a reinvention of capitalism neoliberalism relies upon the same (super)structural arrangements and forces that feed the economic base of classical capitalism, notably markets and competition.

As such neoliberalism is little more than a new name for a reconfigured form of capitalism that has pushed society towards an unreserved acceptance of the God-like nature of the market system and the forces of competition that lure stakeholders into engagement, action and investment, both economically and psychically. And yet neoliberalism differs from traditional capitalism insofar as it claims a moral project and a set of ethical imperatives that, as the Mont Pelerin statement shows, adhere to pure classical economic ideals that predate the brutal turn of capitalism in its high industrial and imperialist forms, but also in its general expansion of global inequality. Thus neoliberalism, almost as a perverse complement to communism's critique of capitalism, offers a way to reset history in order to not simply mask the reality of capitalism's failures

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<sup>698</sup> Byung-Chul Han claims that within neoliberalism, 'we do not deem ourselves subjugated *subjects*, but rather *projects*: always refashioning and reinventing ourselves' (2017, p.1)

and brutality, but to denude the influence of socialism and communism as a critical and socio-political alternative<sup>699</sup>.

As keys to understanding the nature of neoliberalism, competition and a strong emphasis on markets and marketization prefigure a greater degree of risk that must be assumed by stakeholders in contrast to their capitalist predecessors. Risk is not a marginal consideration in neoliberal thought. On the contrary, it is the fuel for the engine of neoliberal progress. But as Anthony Giddens claims, this emphasis on risk no longer reflects the truth of the external world in shaping human behaviour but is instead ‘manufactured’ in order to satisfy certain prescribed political ends<sup>700</sup>. But he also sees it as positive insofar as risk provides an apparently greater degree or expansion of choice within the social domain<sup>701</sup>. Meanwhile, Philip Mirowski views risk as the *sine qua non* of neoliberal agency, that is, precisely what defines stakeholders in the contemporary age of capitalism:

A denizen of modern neoliberal society has not demonstrated real flexibility of personal identity until they have prostrated themselves before the capricious god of risk [...] Salvation through the market comes not from solidarity with any delusional social class or occupational category, but instead bold assertions of individuality through capitulation to a life of risk [...] the modern culture of risk is the very embodiment of the neoliberal commandment: there is no such thing as commutative justice, and

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<sup>699</sup> The apparent ability of neoliberalism to be all things to all people, both on the left and right of politics, is a key strategy within what Philip Mirowski calls the ‘neoliberal playbook’ (Mirowski, 2013, pp.325-358)

<sup>700</sup> Anthony Giddens. 1999. Risk and Responsibility. *Modern Law Review*, Vol. 62, No. 1 (January), p.4

<sup>701</sup> Giddens, 1999, p.5

consequently, the participant must simply acquiesce in the verdict of the market<sup>702</sup>.

Mirowski's claim is of particular significance here because, if, as he states, 'there is no such thing as commutative justice' then how do we account for the type of civil justice system discussed throughout the thesis so far as a key component of the socioeconomic existence of stakeholders? The answer lies in the first part of the quote: the reliance on and demand for flexibility. This clearly defines a civil justice model tailored to meet economic and market principles that the likes of the Woolf reforms describe, and within this model unconscionability assumes the fetishistic role it does in the neoliberal age. We will return to this matter in more depth shortly.

Risk, like economic reason more generally, has become a standard by which the value of many if not all domains of social activity and behaviour are measured in contemporary neoliberal societies. And neoliberalism, although arguably relying on civil justice to administer a robust private property order as capitalism did during the nineteenth and much of the twentieth century, inherits the doctrine of unconscionability as a particular strategic juridical form through which stakeholders can navigate their exposure to and, I argue, enjoyment of the uncertainties (and risks) of contemporary economic life. Viewed through the prism of Equity fetishism, the tension between certainty in law and uncertainty in (economic) life that engenders risk is in many senses to neoliberal stakeholders what material forms of property were to their nineteenth-century capitalist counterparts. There is no doubt that the contemporary neoliberal stakeholder seeks-out material property and corresponding property rights in accordance with the logic of capitalism. But risk provides a patina and layer of enjoyment that induces stakeholder

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<sup>702</sup> Mirowski, 2013, pp.120-121

engagement and investment in juridical-economic activity, as described in previous chapters, and signifies the augmentation and extension of enjoyment sought by fetishistic stakeholders. As the prevailing dominant socioeconomic ideology, the entrenchment, reproduction and dissemination of neoliberal capitalism is enabled by and conducted through flexible and permissive laws and modes of civil justice. Since the 1873 Act a transition in the nature of civil justice and thus Equity's role in the administration of it occurred by virtue of the implementation of the Rules of the Supreme Court (RSC) and further reform programmes, and did so, I argue, in conjunction with the shifting nature of capitalism.

As a set of juridical strategies within neoliberalism, civil justice no longer simply involves the exclusive practices, reasoning and dominion of the courts but often occurs in the shadow of the courts<sup>703</sup>. The contemporary rise of alternative 'out of court' forms of settlement and bargaining, especially ADR and mediation as means to maximise flexibility, cost-effectiveness and efficiency in civil procedure, has arguably augmented Equity's role in contemporary civil justice by 'standing in the breach created by the merger of Law and Equity', and 'reincarnating' Equity<sup>704</sup>. In other words, ADR and civil justice reform more broadly has, under the terms of this thesis, given new life to the fetishization of Equity, not least because it has reemphasised and re-energised the role of

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<sup>703</sup> James J. Alfini and Catherine G. McCabe. 2001. Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law. *Arkansas Law Review*, Vol. 54, No.2, pp.171-206; Stychin and Mulcahy, 2007, pp.363-368

<sup>704</sup> Main, 2005, pp.329-330. Flexibility and 'the need to adapt procedures to the circumstances of the particular case is a common theme' begins Sir Rupert Jackson in his lecture to the Chartered Institute of Arbitrators, that is 'the purpose of the 'tracks' which Lord Woolf introduced in 1999' (Sir Rupert Jackson. 2016. Civil Justices Reform and Alternative Dispute Resolution. *Judiciary of England and Wales*, 20 September. [Online] Available at: <https://www.judiciary.uk/wp-content/uploads/2013/03/lj-jackson-cjreform-adr.pdf> (accessed 23 June 2018)

flexibility in law and civil justice procedure<sup>705</sup>. 'ADR is more flexible and adapts to the specific needs and demands of the case', claim Robert B. Moberly & Judith Kilpatrick:

With ADR the parties can utilize creative remedies and a broader range of solutions. Because the courts use a relatively structured approach, the range of remedies available may be quite limited. Lawyers may be required to reframe the issues so as to fit a particular legal doctrine and, thus, the nature of the dispute. As a result, the real issues and tailor an appropriate remedy. When using ADR instead of the court system, judicial precedent may not be as important. ADR often provides for relaxed rules of evidence and procedure, which can enhance flexibility and make the process more streamlined than a judicial proceeding<sup>706</sup>.

Further, and perhaps unsurprisingly given the role we have seen neuroses play thus far in the life of a legal community faced by the gradual colonisation of law by economics, Equity fetishism in the context of the rising influence of ADR has been met by neurotic counteraction. Lord Neuberger, for example, has argued both a defence of formal, court-based civil justice, and, in a starkly anti-neoliberal move, for a rejection of consumerist justice<sup>707</sup>. What is more, Neuberger's particular neuroses exemplify an opposition between reality and fantasy that we explored in earlier chapters, as he equivocates between the reality of law's colonisation by economics, and fantasy in the form of

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<sup>705</sup> Woolf, 1996

<sup>706</sup> Robert B Moberly and Judith Kilpatrick. 2001. Introduction: The Arkansas Law Review Symposium on Alternative Dispute Resolution. *Arkansas Law Review*, Vol. 54, No. 2, p.167

<sup>707</sup> Lord Neuberger. 2010. *Equity, ADR, Arbitration and the Law: Different Dimension of Justice*. The Fourth Keating Lecture, 19 May. [Online] Available at: <http://www.civilmediation.org/downloads-get?id=98> (accessed 23 June 2018); Lord Neuberger. 2010. *Has Mediation Had Its Day?* The Gordon Slynn Memorial Lecture. 11 November. [Online] Available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf> (accessed 23 June 2018); see also: Hazel Genn. 2012. What is Civil Justice For? Reform, ADR, and Access to Justice. *Yale Journal of Law & the Humanities*, Vol. 24, Issue 1, Article 18, pp.397-417

lamenting the effect of economics on the 'value' of justice<sup>708</sup>. The former can be seen in the following passage from his 2010 lecture to representatives of the Chancery bar:

A successful capitalist economy, as Adam Smith pointed out, depends on a trusted and effective legal system. That is particularly true of an emphasis on financial and associated services. In that connection, the high reputation of our legal services, our courts and our law has served us very well since the 18th century. But we cannot afford to sit on our laurels. High legal costs do not always present the same problem for large businesses and a few very rich individuals, but legal costs are rarely an irrelevant factor even to them. So competition from other jurisdictions must always be in our minds. And it's not just arbitration and the new courts in Singapore, Dubai, Qatar and the like: there are now courts in Germany and the Netherlands which offer English language hearings. The threat to the British economy if we cease to be pre-eminent in the commercial legal world is self-evident<sup>709</sup>.

The latter in a keynote address to a civil mediation conference:

Provided we acknowledge and take into account the disadvantages of mediation and do our best to cater for them or to neutralise them, I think we can and should be pretty uninhibited about supporting the idea of mediation in civil and family disputes. Since 1999, with the Woolf reforms, and even more since 2012 with the Jackson reforms, there is a very strong

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<sup>708</sup> Freud, 2001a, p.110

<sup>709</sup> Lord Neuberger. 2012. *Developing Equity – A View from the Court of Appeal*. Chancery Bar Association Conference, London. 20 January. [Online] Available at: [www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf) (accessed 23 June 2018) at 5

presumption that the court time and the legal costs involved in any civil case should be proportionate to the value of what is at issue in the case. *Of course, the “value” of a case in this context is not limited to pure financial value, but normally and inevitably financial value is a major factor, and, frankly, sometimes the only factor, when one is assessing proportionality* [emphasis added]<sup>710</sup>.

Echoing the notion of civil justice expansion beyond the court as a neoliberal strategy, Gabel and Feinman state in their assessment of the relationship between contract and ideology that, '[m]ost of the time the socioeconomic system operates without any need for law as such because people at every level have been imbued with its inevitability and necessity'<sup>711</sup>. Gabel and Feinman's claim here is, I argue, reflective of the particular shift in civil justice caused by neoliberalism that Lord Neuberger is motivated by but ultimately struggles to reconcile. The effect of neoliberalism on modalities of civil justice (like justice more broadly conceived) has been not only to subject them to programmes of calculable efficiency (the 'value' problem that Neuberger laments), but also to provoke a degree of hand-wringing regarding the (im)possibility of justice in an unjust world that inevitably leads, as Simon Critchley says, to 'contemplative withdrawal [...] a sort of drift, disbelief and slackening that is both institutional and moral' and thus ultimately to submission to the dictates of neoliberal capital, hence Neuberger's concern for the reputation and relative competitiveness of British legal services<sup>712</sup>.

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<sup>710</sup> Lord Neuberger. 2015. *Keynote Address: A View from On High*. Civil Mediation Conference. 12 May. [Online] Available at: [www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf](http://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf) (accessed 23 June 2018) at 13

<sup>711</sup> Gabel and Feinman, 1998, p.508

<sup>712</sup> Simon Critchley. 2012. *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*. London: Verso, pp.38-39



Neoliberalism has accelerated the capitalist agenda during the last forty years by broadening capitalist logic and reason to include wider and more personalized pursuit of self-interest. If, as David Harvey suggests, neoliberalism produces a chaos of individual interests, and, as William Davies claims, the ‘economist’s vocational and epistemological distance from moral reasoning is the crucial ingredient in neoliberal legal authority’, then the civil justice required in order to meet neoliberal interests, unless deliberately geared towards forms of restraint against those interests must flow with and work in the shadows of that chaos and amorality<sup>713</sup>. If this can be interpreted as relating to laws that are systemized and encompass a degree of rule-compliance whilst remaining agile, flexible and discretionary, then it is clear that the type of civil justice implied matches conceptualisations of ECJ. Neoliberal approaches to civil justice take seriously, and arguably more so than during the nineteenth century, the flexible and imaginative tenets of ECJ that allow more discretion and a greater free-play of enterprise around the fringes of legislation, regulation and the core of rule compliance at the heart of the property rights regime<sup>714</sup>.

Equity fetishism, whilst a product of nineteenth-century capitalism, has, therefore, always already been primed for the coming of the neoliberal age and a time in which ‘remedies to any problems have to be sought by individuals through the legal system’, and conceptions of fairness and equality are seen merely as ‘atavistic holdovers of old images of justice that must be extirpated from the modern mind-set’<sup>715</sup>. What we have seen with regard to civil justice as representative of the requirements of the legal system within neoliberalism, however, is a stretching and manipulation of the traditional

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<sup>713</sup> Harvey, 2005, p.83; Davies, 2017, p.101

<sup>714</sup> See, for example: Millett, 1998; Neuberger, 2009; Deirdre Ahern. 2012. Directors’ Duties, Dry Ink and the Accessibility Agenda. *Law Quarterly Review*, Vol. 128 (January), pp.114-139

<sup>715</sup> Harvey, 2005, p.67; Mirowski, 2013, p.63

boundaries of civil justice in order to ensure that flexibility no longer applies to the application of rules and doctrines alone, but also to modes of adjudication as well. This is, I argue, a validation of ECJ's flexibility within the legal system, to civil justice, made by neoliberal stakeholders. Insofar as neoliberalism is said to recreate and memorialize principles of free market neo-classical economics that 'emerged in the second half of the nineteenth century (thanks to the work of Alfred Marshall, William Stanley Jevons, and Leon Walras) to displace the classical theories of Adam Smith, David Ricardo, and, of course, Karl Marx', then seeing how Equity fetishism translates from the late nineteenth to late twentieth century with relative conceptual ease becomes clearer<sup>716</sup>. With regard to unconscionability as a remedy primed to support *inter alia* transactions of commercial stakeholders, Equity fetishism points to the belief that there is a fix for each and every problem that might arise, including those in other areas and competences of the law.

In her discussion of the need to 'fill gaps' in the *Companies Act* 2006 for instance, Deirdre Ahern remarks that the 'flexibility of broad, principle-based judge-made rules facilitated judicial revitalisation of the duties where required to move with the changing world view in relation to corporate standards. Age-old principles proved capable of yielding new applications and new perspectives and this was instrumental in ensuring that the duties retained both credibility and relevance'<sup>717</sup>. Despite the neoliberal reinvigoration or 'reincarnation' of Equity, Equity fetishism, I argue, is a testament to the reality capitalism has thus far failed and will continue to fail to universalize complete justice<sup>718</sup>. 'When universal law is recognized, idols are destroyed', argues Jean-Joseph Goux, '[t]his law is what enables the subject at last to bear the emptiness of the sanctuary without needing

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<sup>716</sup> Harvey, 2005, p.20

<sup>717</sup> Ahern, 2012, p.134

<sup>718</sup> Main, 2005

to furnish it with fetishes and images'<sup>719</sup>. Captured in the concept of Equity fetishism there is an indication that stakeholders are not yet able or prepared to bear such emptiness. The existence of Equity fetishism thus reveals an even greater monument to the castration that stakeholders deny is central to subjectivity as such within neoliberalism than during earlier points in Equity's history within capitalism.

The repetitive equivocation between crisis and failure that requires capitalism to be reimagined fits broadly with what Joseph Schumpeter referred to as 'the essential point to grasp' when dealing with capitalism: that it is a fundamentally evolutionary system that can 'never be stationary'<sup>720</sup>. The non-stationary nature of capital celebrated by the likes of Schumpeter abhors the inflexible rule and instead favours discretion and merit as modes of adjudication. The flexibility of Equity thus favours neoliberal civil justice and the stakeholders invested in it who demand rules that bend to their will and self-interest. Discretion is not the court's alone in this regard, however, as when regulatory standards around, for example, taxation become too onerous for stakeholders to bear, and they and their capital take flight off-shore or hide behind obscure concentrations of economic power, namely, trusts<sup>721</sup>. In that sense the 'versatility' of trusts, as described by Jonathan Garton, meets the versatility of modern private capital in its ability to flow freely to where it is less threatened by public or state interference<sup>722</sup>. As John Christensen explains: 'If the trustee, the beneficiary, and the trust assets are located in the right combination of jurisdictions, tax can often be avoided altogether without technically breaking the law'<sup>723</sup>.

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<sup>719</sup> Goux, 1990, p.159

<sup>720</sup> Schumpeter, 2010, p.72

<sup>721</sup> Harrington, 2016, p.13

<sup>722</sup> Garton, 2015, p.5.

<sup>723</sup> Christensen, 2015, p.141

Capitalism never leaves nor surrenders its grip on the domain of the social despite appearances or claims to the contrary. As John Maynard Keynes remarked: 'It [capitalism] is a method for bringing the most successful profit-makers to the top by a ruthless struggle for survival, which selects the most efficient by the bankruptcy of the less efficient. It does not count the cost of the struggle, but looks only to the benefits of the final result which are assumed to be permanent'<sup>724</sup>.

The dominance of capitalism throughout the majority of the twentieth-century and beyond (including at times of crisis) is a project of such resilience as to appear all but complete and victorious in its aims – 'permanent', to echo Keynes. The many guises capitalist class power assumes (including neoliberalism) simply mask and detract from what is otherwise an unrelenting and durable set of core ideological practices and tendencies. For stakeholders seeking to deflect the trauma of castration, through private property, the versatility of trusts to create wealth and so on, capitalism's endurance explains its appeal. Moreover, it explains why stakeholders are keen to mobilize the legitimating forces of law and civil justice in support and defence of capitalist ideology, and how this project has spread. The neoliberal vision of law and justice now forms the basis of much-uncontested wisdom espoused, for example, in legal education textbooks,

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<sup>724</sup> John Maynard Keynes. 2015. *The Essential Keynes*. Edited by Robert Skidelsky. London: Penguin Classics, p.50

where competition is viewed as normative and a central tenet of legal common sense<sup>725</sup>. At a general level Mirowski refers to this as ‘a whole panoply of diverse "policy" responses’<sup>726</sup>. For the purposes of this thesis, we see it as far more specific: the application of ECJ in order to provide the flexible and agile civil justice system needed to complement and shadow the evolution of never stationary capital.

#### 4. Legal contortionism as neoliberal strategy

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It [law] provides only the means for a large number of different purposes that as a whole are not known to anybody. In the ordinary sense of purpose law is therefore not a means to any purpose, but merely a condition for the successful pursuit of most purposes. Of all multi-purpose instruments it is probably the one after language which assists the greatest variety of human purposes. It certainly has not been made for any one known purpose but rather has developed because it made people who operated under it more effective in the pursuit of their purposes<sup>727</sup>.

Equity fetishism is symptomatic of the fullest capability of legal contortionism: flexibility, adaptability, efficiency and agility, all of which are required and demanded within neoliberalism so stakeholders can manage uncertainty and negotiate risk in personal and commercial settings alike. These legal contortions applied and performed at the level of civil justice are not merely instrumental to more efficient and effective juridical-economic ontologies but become part of the fabric of neoliberal existence. ‘Flexible specialisation can be seized upon by capital’, argues David Harvey, ‘as a handy way to procure more

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<sup>725</sup> Consider, for example, the following passage from a textbook on Competition Law:

Competition means a struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the market place [...] The ideological struggle between capitalism and communism was a dominant feature of the twentieth century. Many countries had the greatest suspicion of competitive markets and saw, instead, benefits in state planning and management of the economy. However enormous changes took place as the millennium approached, leading to widespread demonopolisation, liberalisation and privatisation. These phenomena, coupled with rapid technological changes and the opening up of international trade, unleashed unprecedentedly powerful economic forces. These changes impact upon individuals and societies in different ways, and sometimes the effects can be uncomfortable. Underlying them, however, is a growing consensus that, on the whole, markets deliver better outcomes than state planning; and central to the idea of a market is the process of competition. (Richard Whish and David Bailey. 2015. *Competition Law*. 8<sup>th</sup> Edition. Oxford: Oxford University Press, p.4)

<sup>726</sup> Mirowski, 2013, p.336

<sup>727</sup> Hayek, 2013, p.107

flexible means of accumulation'<sup>728</sup>. In terms of civil justice this includes leaving open the possibility that the courts will have discretion concerning remedies and the path to remedies, namely unconscionability, and the need for 'versatility', as we have previously seen with regard to trusts<sup>729</sup>. Mark Pawlowski maintains that unconscionability has been adopted by the English courts far more broadly in recent years, and has, I argue, under the ideological aegis of neoliberalism proven a suitably wide-ranging and agile counterpart to the socioeconomic activities of competitive risk-inclined stakeholders<sup>730</sup>.

Whilst we examined unconscionability in earlier chapters, it is important to restate some of the characteristics of the doctrine here, as it forms the backdrop to this section of the chapter. Unconscionability is defined in a variety of ways that appeal within neoliberal thought. These definitions include highlighting the moral scope and content of the doctrine, as well as the ability to foster flexible and complete justice between parties. Drawing on a formulation of the doctrine in the nineteenth century, notably the case of *Fry v Lane* (1888) 40 Ch D 312, unconscionability has been defined as the intervention by Equity 'to set aside unfair transactions made with "poor and ignorant" persons'<sup>731</sup>. Following the more recent decision in *Hart v O'Connor* [1985] AC 1000 a 'preferable interpretation' of unconscionability has been viewed as being in cases where the court is able to show 'that the defendant acted in a morally reprehensible manner'<sup>732</sup>. Meanwhile, flexibility and adaptability are necessary, as Peter Birks maintained, to meet 'constant

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<sup>728</sup> Harvey, 2005, p.76

<sup>729</sup> Nicholas Hopkins. 2007. How Should We Respond to Unconscionability? Unpacking the Relationship between Conscience and the Constructive Trust, in *Contemporary Perspectives on Property, Equity and Trusts Law*. Edited by Martin Dixon and Gerwyn LL H Griffiths. Oxford: Oxford University Press, p.4

<sup>730</sup> Pawlowski, 2001, p.79

<sup>731</sup> (1888) 40 Ch D 312; Jill Martin. 2012. *Modern Equity*. 19<sup>th</sup> Edition. London: Sweet & Maxwell, p.911; Charles Harpum, Stuart Bridge and Martin Dixon. 2012. *The Law of Real Property*. 8<sup>th</sup> Edition. London: Sweet & Maxwell, pp.284-285

<sup>732</sup> Virgo, 2015, p.280

change in pursuit of justice', because 'it is important to remember that we do live in a legal world where continual and rapid change is an inescapable reality'<sup>733</sup>.

There is no serious claim to be made regarding capitalism's invention of unconscionability – the *long durée* of Equity discussed throughout this thesis clearly shows this is not the case. Instead, neoliberalism has seized upon unconscionability as a formal and legitimate mode of legal reason, remedy and adjudication that also engenders the requisite flexibility neoliberalism demands. 'Unconscionability is equity's jurisprudence', argues Gary Watt, 'since the word identifies that very species of wrongdoing which it is the peculiar function of equity to remedy, that wrongdoing being any conduct which, having no substantial justification, turns the common law into an instrument of harm by taking advantage of a general provision or general omission of the common law to oppress a party in the particular case'<sup>734</sup>. For Graham Virgo statutory intervention via the *Consumer Credit Act* 1974 is the 'most important statutory provision relating to unconscionable conduct'<sup>735</sup>. The Act 'gives the court extensive powers to deal with credit agreements where the relationship between the creditor and the debtor arising from the agreement is unfair to the debtor because of the terms of the agreement, the way in which the creditor enforced his rights under the agreement or anything else which the creditor has done or failed to do'<sup>736</sup>.

Organizing civil justice in light of the demands of economic advantage enables stakeholders to secure the kind of favourable legal system highlighted by Hayek: an all-pervasive form of economic reason that, as Philip Mirowski maintains, insists 'upon the

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<sup>733</sup> Birks, 1996, p.4

<sup>734</sup> Gary Watt. 2007. Unconscionability in Property Law: A Fairy-Tale Ending? in *Contemporary Perspectives on Property, Equity and Trusts Law*. Edited by Martin Dixon and Gerwyn LL H Griffiths. Oxford: Oxford University Press, p.128

<sup>735</sup> Virgo, 2015, p.286

<sup>736</sup> Virgo, 2015, p.286

thoroughgoing ignorance of everyone in the face of the all-knowing market', one built on a platform of the chaotic free play of economics<sup>737</sup>. Economic reason that is purposefully and superficially nebulous and shape-shifting, yet perversely still reliant on a degree of formalism and rule compliance. The privileging of Equity's notion of conscience in civil justice, which is channelled through the doctrine and language of unconscionability, engenders the essence of the liberal and flexible approach to civil justice favoured by neoliberalism. One which perversely disrupts neurotic concerns that the language of unconscionability can only ever be capable of 'sensible application' and a 'useful role in the story of property law [...] provided it is kept distant from infractions of moral conscience and social mores'<sup>738</sup>.

As with Virgo's example of the *Consumer Credit Act*, it is important to note that the Act, like unconscionability, does not simply enforce an imperative of fair dealing among parties who may be unequal in terms of social or economic power, but foregrounds a morality that is always already economized in the neoliberal sense of ideological strategy<sup>739</sup>. On these terms, unconscionability has, as Simon Chesterman has argued, affected 'change at a level deeper than the application of doctrine', in accordance with neoliberalism, it has helped change 'the structure of justice itself'<sup>740</sup>. Moreover, as Watt reminds us the 'language of unconscionability arises from the long saga of law's relationship to morality and in this sense borders on fiction and has the potential to engage with extra-legal notions of moral or ecclesiastical conscience'<sup>741</sup>. Although he also adds, as if to negate any perverse estimations of the true value of conscience in law that

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<sup>737</sup> Mirowski. 2013, p.119

<sup>738</sup> Watt, 2007, p.137

<sup>739</sup> Gorz, 1989, p.2; Brown, 2015, p.151; Davies, 2017, pp.21-28

<sup>740</sup> Chesterman, 1997, p.2

<sup>741</sup> Watt, 2007, p.128



‘most jurists long familiarity has bred healthy caution’ when it comes to the possibility of extending the moral virtues of Equity beyond the margins of the legal context<sup>742</sup>.

Unconscionability plays a significant role in sustaining the fantasy of complete justice by appearing to offer stakeholders more than a mere procedural framework in which to conduct and navigate their existence within society. The very notion of a procedural framework is made elastic within the terms of neoliberal justice, and unconscionability provides an effective means of following the contours of such nebulous juridical conditions. More than that perhaps, Equity fetishism offers stakeholders a type of ‘spiritual duty in the form of what were termed moral obligations’, but are simply an ‘equitable diversion of positive norms’, and unconscionability is a good solution for stakeholders on these terms<sup>743</sup>. Under neoliberalism, unconscionability helps transform ‘the ideology of ‘freedom and equality’ [...] into a new image that might retain the legitimating power of the older images while modifying them to conform more closely to the actual organization of daily life in the modern era’<sup>744</sup>. In contrast to the types of capitalism discussed thus far it is no longer simply a project of complete justice that Equity is engaged with but under neoliberalism a far broader, nebulous and more pervasive social project that, to echo Wendy Brown, reaches for the very soul of the stakeholder<sup>745</sup>. A project, as we have already seen, fuelled not simply by stakeholder desire for property rights, but equally by the need for flexibility and agility in order to navigate the risks that accompany the accumulation of property rights and a competitive struggle for wealth within contemporary neoliberal capitalist societies.

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<sup>742</sup> Watt, 2007, p.128

<sup>743</sup> Goodrich, 1996, p.26. The diversionary nature of unconscionability in this context further points to fetishism (Balibar, 2017, p.73)

<sup>744</sup> Gabel and Feinman, 1998, p.505

<sup>745</sup> Wendy Brown. 2005. *Edgework: Critical Essays on Knowledge and Politics*. Princeton: Princeton University Press, p.39

So, Gary Watt's claims concerning unconscionability - that '[i]f the retention of the language of unconscionability happens incidentally to perpetuate humane and aspirational virtues of conscience, that is well and good, but there is no room for the promotion of transcendental moral notions of 'good conscience' as a basis for enforcing and allocating rights in property' - might ring true from the point of view of the law's neurotic protection of its own internal logic<sup>746</sup>. But from the point of view of perverse, fetishistic neoliberal stakeholders a doctrine such as unconscionability is precisely that which possesses a degree of the transcendental as a spiritual duty reproduced through the banal yet flexible diversion that ECJ offers from the risk-averse restraint of law's positive norms.

David Harvey claims that under neoliberalism 'remedies to any problems have to be sought by individuals through the legal system', yet, and albeit given a far more specific analysis of the legal context, it is important to consider this simple idea alongside Watt's claim that any 'judge who employs the language of unconscionability as a means of ditching property rules in favour of moral intuition is abusing the name of conscience'<sup>747</sup>. On the one hand, Harvey paints a picture of the legal context in which perverse stakeholders conduct themselves and perform their contractual social relations. That a stakeholder is expected to use the legal system to remedy what are predominately contractual *qua* economic and financial issues points directly to the call of the neoliberal founders to respect the rule of law and the ramifications that flow from it. On the other hand, through a further demonstration of the type of neurotic defence of legal principles that coloured the Judicature reform process by attempting to stave off the influence of

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<sup>746</sup> Watt, 2007, p.118

<sup>747</sup> Harvey, 2005, p.67; Watt, 2007, p.118

stakeholders in shaping civil justice post-Judicature, Watt reveals the strategic value that unconscionability holds for fetishistic neoliberal stakeholders.

A clear and, I argue, a deliberate contradiction exists, therefore, between the value neoliberal thought places on stakeholder engagement with risk and the function the civil justice structure has in appearing to mollify uncertainties. Accordingly it is through a privileging of doctrines such as unconscionability within the civil justice system that judges actually 'justify the normal', that is, capitalist, 'functioning of the system' by resolving the conflict through fetishized legal forms that promise to fix the failure of, for example, contracts to suitably facilitate social relations between stakeholders<sup>748</sup>. In response to Harvey's claim, therefore, I further argue that stakeholders substitute personal conscience for both a contract and the remedy of unconscionability that interjects at the point of the failure of that contract and this enables a certain freedom from the restraints of conscience. ECJ, broadly-speaking, thus serves as the *de facto* conscience of neoliberal stakeholders, a fundamental strategic significance and purpose of ECJ and specifically the doctrine of unconscionability.

Neoliberalism demands that stakeholders walk a fine line between 'success' (profit, accumulation) and 'failure' by virtue of its privileging of risk, and civil justice must, therefore, offer a safety-net for stakeholders. As Mirowski argues, 'accepting risk is not the fine balancing of probabilities, the planning for foreseen exigencies and the exercise of prudential restraint; rather it is wanton ecstasy: the utter subjection of the self to the market by offering oneself up to powers greater than we can ever fully comprehend'<sup>749</sup>. Accordingly, for stakeholders to have a sense that they are insulated when it comes to

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<sup>748</sup> Gabel and Feinman, 1998, p.508

<sup>749</sup> Mirowski, 2013, p.119

necessarily exposing themselves to risk in everyday economic life, or that their individual economic conditions can somehow be 'reset' by remedies is important.

Citing P.S. Atiyah's view on risk and contract in light of Lord Woolf's recommendations for the application of remedies in Equity to address a commercial financial loss - although he does not agree with it wholeheartedly - Hudson highlights how unconscionability is used to shape more effective commercial practices<sup>750</sup>. This involves ECJ in the context of commercial contracts being used to promote 'greater economic efficiency by requiring commercial people to become better at evaluating such risks before forming contracts'<sup>751</sup>. The type of preparedness and due diligence that Atiyah appears to advocate when it comes to stakeholders engaging in contractual relations might be interpreted as common sense. If you are able to understand the ramifications of what you are contractually agreeing to, Atiyah appears to say, then you have successfully evaluated the risk that naturally accompanies the contractual process. As, arguably, a neurotic response to risk, however, and not the response we would expect from the perverse fetishistic stakeholder, the type of contractual regime Atiyah is advocating does not account for the lure that risk has for stakeholders. Thus it is a desire *for* rather than protection *against* risk that justifies stakeholder evaluation of the contractual regime in which they commit to socioeconomic transactions. What could easily be interpreted here as either legal instrumentalism or a sort of 'baptism by fire' for commercial actors who fail to suitably (or rationally) evaluate the risks before committing to a commercial transaction, is in actuality entirely in tune with the normative forms of competitive risk-taking contained within the ethos that neoliberalism promotes. So, whilst Hudson feels it necessary to undertake a 'defence of Equity' regarding commercial actors who may see it as a body of

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<sup>750</sup> Hudson, 2017, p.912

<sup>751</sup> Hudson, 2017, p.912

law that works against their interest by unreasonably restraining their exposure to risk, considered through the lens of neoliberal reason the opposite is instead true. For stakeholders, Equity is absolutely the *thing* as a strategy embedded within economic risk-taking, because it inoculates against economic failure whilst fostering belief in a culture of risk.

As long as the stakeholder is economically active and, importantly, acting competitively by exposing themselves to risk, they have, in strict neoliberal terms, already proven themselves successful. As Atiyah maintains, in an overtly neoliberal voice: ‘The whole point of the free market bargaining approach was to give full rein to the greater skill and knowledge of those who calculated risks better [...] He who failed to calculate a risk properly when making a contract would lose by it, and next time would calculate more efficiently’<sup>752</sup>. In short, the stakeholder always comes back for more and the protection offered by discretionary remedies saturated in the deontological imperatives of conscience are a significant way that this can be guaranteed. The emphasis on the remedial *qua* conscience here, therefore, accords with neoliberalism's normative construction and interpellation of the individual as an economic and entrepreneurial actor in every sphere of life. Moreover by acting as the *de facto* conscience of stakeholders, so they need not concern themselves with restrictions their own conscience may place on the elision between the self and economic activity, unconscionability salves stakeholder exposure to the harsh realities of what Wendy Brown calls, “‘mismanaged life”, the neoliberal appellation for failure to navigate impediments to prosperity’<sup>753</sup>.

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<sup>752</sup> P.S. Atiyah. 1979. *The Rise and Fall of Freedom of Contract*. Oxford: Clarendon, p.437, quoted in Hudson, 2017, p.912

<sup>753</sup> Brown, 2005, p.42

In a discussion not only of unconscionability but of the more general concept of compensation, Roberto Esposito says that as a remedy compensation 'implies, and reproduces, what it seeks to make up for'<sup>754</sup>. For the stakeholder unconscionability, like Esposito's notion of compensation, implies a desire to fill a particular lack that exists, for example, with regard to a financial loss, albeit less in terms of bare economic calculation than through a form of subjective or personal (psychic) restitution. Yet in filling this lack the stakeholder equally maintains their belief in the fantasy of complete fulfilment: financial and psychic fulfilment as one and the same. Remedy defined in these terms, much like the broader conception of Equity that holds within its jurisprudence these forms of remedial action, performs the basic requirement of the fetish to substitute and thus deflect from the fact of loss even as actual economic or financial loss might or does occur<sup>755</sup>. 'What else is a surrogate, or prosthesis, if not a device that substitutes a presence, thereby reaffirming its absence?' asks Esposito, and in his question, we can once again discern the basic outline of fantasy and fetishism traceable to Equity and ECJ<sup>756</sup>. Fantasy 'denotes a framing device which subjects use to "protect" themselves from the anxiety associated with the idea that there is no ultimate guarantee or law underlying and guiding our social existence', argues Jason Glynos, '[t]his guarantee has been given many names, certainly when one takes the long historical view: God, Reason, the Senses, the Laws of History, and so on. But this guarantee – conceived as a key part

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<sup>754</sup> Roberto Esposito. 2011. *Immunitas: The Protection and Negation of Life*. Cambridge: Polity Press, p.82

<sup>755</sup> Freud, 2006, pp.90-91

<sup>756</sup> Esposito, 2011, p.82

of the fantasmatic device used to defend against a form of "Cartesian anxiety" – can take any guise whatsoever'<sup>757</sup>.

## 5. Conclusion

Unconscionability is an example of what Hartmut Böhme calls 'fetishistic synecdoche' - 'a figure through which the signifier completely substitutes the object it refers to, thereby becoming independent of this object'<sup>758</sup>. Unconscionability *qua* Equity fetishism is a function of a culture of legal contortionism and remedial strategizing employed by stakeholders against a backdrop of risk, competition and market engagement as requirements in contemporary economic life. Neoliberal emphasis on competition, risk and strategies to manage the two, gives civil justice purpose, and makes ECJ an economic consideration first and foremost. As Davies maintains: '[a]s a replacement for the pursuit of justice itself, neoliberalism offers the goal of competition as a form of quasi-justice, which lacks a substantive concept of the common good'<sup>759</sup>. And so, by virtue of the recurrent neoliberal problematic of 'how to represent or stabilize uncertainty, without determining it through political dictat', civil justice as a set of strategies 'offer to solve this'<sup>760</sup>.

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<sup>757</sup> Glynos, 2012, p.2405. We have, for instance, discussed this previously with regard to Equity's development of the law of fiduciaries, and it also obtains in the notion of protecting vulnerable parties via the doctrine of undue influence. See, for example: *Bank of Credit and Commerce International S.A. v. Aboody and another* [1990] 1 Q.B. 923; see also: Millet, 1998, p.220 – 'The equitable doctrine of undue influence looks to the lack of good conscience on the part of the person exercising the influence. It is concerned with the way in which the victim's consent was obtained rather than with the reality of his consent. If resort may be had to the terminology of judicial review, it is concerned with procedural rather than with substantive unfairness. If the complaint is of serious substantive unfairness, it may be more appropriate (and is likely to be more rewarding) to turn to the ancient jurisdiction of equity to relieve against harsh and unconscionable bargains'; Virgo, 2012, p.34

<sup>758</sup> Hartmut Böhme. 2014. *Fetishism and Culture: A Different Theory of Modernity*. Translated by Anna Galt. Berlin: De Gruyter, p.311

<sup>759</sup> Davies, 2017, p.107

<sup>760</sup> Davies, 2017, p.115

The neoliberal notion of having a strategy (Wendy Brown talks of the neoliberal citizen ‘who strategizes for her- or himself among various social, political, and economic options’) begins with remedies assuming the object thingness of Equity fetishism<sup>761</sup>. The unknown purpose of the object thingness of Equity-as-remedy is transformed into an adaptable strategy and assumes a known purpose ‘developed because it made people who operated under it more effective in the pursuit of their purposes’<sup>762</sup>. Unconscionability gives stakeholders a formalized conscience and within a semantics of perverse neoliberal stakeholder fantasy, complete justice *qua* Equity fetishism re-emerge as object(tive) strategies always already indexed to the stakeholder’s fate in a society beholden to competitive and risky market activity and conduct.

Unconscionability marks a significant point of expansion of the traditional basis of the relief proffered by Equity<sup>763</sup>. ‘The transformations seen in the equitable jurisdiction’, claims Simon Chesterman, ‘mark a deeper transformation not merely in the formal (procedural) dispensation of justice, nor indeed the substantive rights of parties, but in the structure of justice itself’<sup>764</sup>. ECJ *à la* unconscionability speaks to a particular emphasis given by stakeholders to judicial discretion. Specifically forms of discretion that impose upon the neurotic judge, not the perverse stakeholder, the real risk of injustice<sup>765</sup>. As a flexible, imaginative and discretionary invention unconscionability assumes the characteristic of a combination of certainty and uncertainty, ‘the known and the unknown’ and ‘the experience of a limit’<sup>766</sup>. Moreover, it is a point of fantastical ecstasy that always already engenders the actions of neoliberal stakeholders in pursuit

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<sup>761</sup> Brown, 2005, p.43

<sup>762</sup> Hayek, 2013, p.107

<sup>763</sup> Mason, 1994, p.238

<sup>764</sup> Chesterman. 1997, p.357

<sup>765</sup> Chesterman. 1997, p.363

<sup>766</sup> Chesterman. 1997, p.363



of the enjoyment of their economic and proprietary interests, and the corresponding pleasure and relief felt by them by virtue of the remedial intervention that denies failure and thus denies lack. As Bernard Harcourt maintains: "The element of desire in the notion of "fantasy", naturally, emphasizes wish fulfilment in the Freudian sense, but also an idea of playfulness. There is something enjoyable, often libidinal, which satisfies the person who believes"<sup>767</sup>.

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<sup>767</sup> Harcourt, 2012, p.2417

## Chapter 9

# *Law and the Reality it Masks: A Conclusion*

We have arrived at the conclusion that without abolishing the distinction between law and equity, or blending the Courts into one Court of universal jurisdiction, a practical and effectual remedy for many of the evils in question may be found in such a transfer, or blending of jurisdiction, coupled with such other practical amendments as will render each Court competent to administer complete justice in the cases which fall under its cognizance. We think that the jurisdiction now exercised by the Courts of equity may be conferred upon Courts of law, and that the jurisdiction now exercised by Courts of law may be conferred upon Courts of equity to such an extent as to render both Courts competent to administer entire justice without the parties in the one Court being obliged to resort to the aid of the other<sup>768</sup>.

### 1. Introduction

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The statement quoted above from Lord Chancellor Campbell at the second reading of the Law and Equity Bill in 1860, one of the many stepping stones towards Judicature reform, is univocal in its appraisal of what is required to remedy the perceived ills in pre-Judicature civil justice. Latent in Campbell's remedy 'for many of the evils' were serious questions regarding the future of the Court of Chancery: questions that were crucial in shaping the idea that civil justice ought to be more competent so as to achieve complete justice. For Lord Campbell or any number of lawyers, whether in the nineteenth century or at any time in history, a competent justice system able to demonstrate not its own competence so much as that of the legal community who operate within it, makes it a vital consideration for civil justice reform.

What amounts to competence for the lawyer who must defend the ways and means of law with neurotic determination is, however, not necessarily the same interpretation of competence arrived at by stakeholders for whom the civil justice system must work in

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<sup>768</sup> *Law and Equity Bill Second Reading*. HC Deb 24 April 1860 Vol. 158 cc1-211

particular ways and produce particular and economically valid results. As Duncan Kennedy claims: 'If the cardinal principle, the legal foundation of capitalism, was that the state must respect the will of private parties concerning property and contracts, and if the cardinal principle rigidly controlled the particular subrules, then it was much more plausible to describe the economic process as "free"'<sup>769</sup>. Moreover, by ensuring economic reason as determinative of freedom through a regime of rights in and over property, in personal and commercial contexts, civil justice facilitates enjoyment for the stakeholder around a set of fantastical and perverse interests. As Alison Dunn maintains, '[I]n the commercial setting, equity's armoury is particularly attractive. The increasing complexity of the commercial world, with its diverse forms of property transactions, dictates a more direct and far-reaching approach to the recovery of assets than the common law can provide'<sup>770</sup>. This is one example of Equity as competent in the eyes of the stakeholder, and, therefore, equally an 'attractive' object of desire and devotion. Given the discussion throughout this thesis, it is important to ask what competence represents or, more importantly, what realities it ultimately masks in terms of complete justice, the nature of civil justice more broadly, and the relationship of these to the existence and psychic life of stakeholders.

Competence is not a word or idea used expansively by this thesis thus far, and specifically not in relation to the theorization of the Judicature reforms and the results that flowed from them in the years of civil justice reform and evolution under capitalism that followed. The intention here is not to introduce a novel principle that will steer the critique along a new path. Instead the notion or ideal of competence posited by Lord

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<sup>769</sup> Kennedy, 1985, p.956

<sup>770</sup> Alison Dunn. 1999. Equity is Dead. Long Live Equity! *The Modern Law Review*, 62:1 (January), p.149

Campbell is relevant because it provides a means of summarizing and to some degree reconciling the main themes addressed during this thesis.

## 2. (In)competent justice

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The idea of competence as it is understood here spans two planes. Firstly, the transcendentalism of ECJ, that is, as a stakeholder fetish charged with the authorial promise of guaranteeing private property rights to one party or another that legitimate engagement in the private property order and bind it to the promise of the accumulation of wealth, and, ultimately, the belief in the future perfect of the secular and Godless ‘thou will be done’ of economic reason. Secondly, the utter banality, bureaucracy and utility of civil justice that threatens to anchor the stakeholder ‘in the drudgery of daily life’<sup>771</sup>. Presented by Lord Campbell during a period of rapid growth in capitalism during the mid-nineteenth century, the notion of competence echoed one of Sir John Mitford’s earlier key determinations of the role of Equity’s ‘extraordinary jurisdiction’, namely that the Court of Chancery assumed control over Common law jurisdictions by ‘removing from them suits’ which they were ‘incompetent to determine’<sup>772</sup>. What I claim are determinations of complete justice based on notions of competence that engender a marriage of the transcendental with the bureaucratic in harmony with neoliberal thought; what we might otherwise call a ‘super-banality’<sup>773</sup>. The competence of which Lord Campbell spoke continues, in other words, to resonate as a contemporary idea more than a century and half later.

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<sup>771</sup> McGowan, 2016, p.224

<sup>772</sup> Mitford, 1876, p.106

<sup>773</sup> Jean Baudrillard. 2001. *Fatal Strategies*, in *Jean Baudrillard Selected Writings*. Edited by Mark Poster. Cambridge: Polity Press, p.203

Like the excessive packaging that accompanies many contemporary commodities and often elicits the ire of the consumer who must negotiate it before they are able to get to the sweet fruit of the commodity inside, the apparent complexities that civil justice wraps around the private property order (that appear to restrain the free-play of stakeholder economic interests) and that constitute competence are transformed by Equity into a tantalizing prospect for stakeholder enjoyment. This is notable in ideas of fairness and conscience, and within the doctrine of unconscionability, which Alastair Hudson says is illustrative of Equity's engagement 'on a deontological, moral project, which it does by reference to the doctrine of precedent and centuries of careful worrying at its core'<sup>774</sup>. And yet, I argue, conscience in this context bears no relation to the 'sense of guilt' that, as Freud tells us, is a vital ingredient in understanding conscience as a tension between the harsh super-ego and the ego of the subject<sup>775</sup>. Guilt is instead reserved for the criminal law where it justifies particular forms of sanction that society says ought to be applied to guilty minds and acts. In contrast, defendants and claimants emerge from the civil justice system as either winners or losers determined not by a morality or ethics that is human, but one that is economic. Regardless of the outcome, conscience remains devoid of any real sense of guilt because it is vouchsafed from elsewhere, as a deferred systemic conscience, rather than a personal one. Conscience does, in that sense, masquerade like the fetish object as a mere prosthesis that acts as a placeholder for what is lacking in the subject.

Further, Equity and ECJ are not suggestive of a moral project with centuries of 'worrying at its core' as Hudson claims, but are instead, and perhaps most notably within neoliberal capitalism, strategies predicated on a one-dimensional consideration that conscience is

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<sup>774</sup> Hudson, 2014, p.61

<sup>775</sup> Freud, 2001e, p.123

and ought to be economically determinative<sup>776</sup>. R.H. Tawney points to enforced reappraisal of the role of conscience in the life of Christendom due to the rise of capitalism as a need to come to terms with an 'obstinate refusal to revise old formulae in the light of new facts' in which the 'whole fabric of their philosophy, truth and fantasy alike, was overwhelmed together'<sup>777</sup>. Max Weber talks of the particular recalibration of conscience in the construction of a 'style of life according to the dictates' of the spirit of capitalism<sup>778</sup>. Whilst Herbert Marcuse describes people 'led to find in the productive apparatus [of capitalism] the effective agent of thought and action to which their personal thought and action can and must be surrendered. And in this transfer, the apparatus also assumes the role of moral agent. Conscience is absolved by reification, by the general necessity of things'<sup>779</sup>. Conscience as a basis for a better and more competent civil justice is, therefore, I argue, part of the expectation of systems and institution's to work towards and achieve deeper and stronger capitalism, including fluid capital market economies that privilege the exchange value of property and the favouring of tradable forms of ownership *qua* proprietary rights and interests. 'At a theoretical level, the association of conscience with moral values, social standards, fairness and justice serves to sustain the quintessential nature of equity or *epieikeia*', argues Alison Dunn, '[o]n a more practical level, the doctrine's inherent pliability enables a flexible approach to be taken not just to the remedy it affords, but also to its triggering requirements – two important characteristics in the face of a changing society'<sup>780</sup>. Dunn's outline of Equity describes the clash of apparent supra-economic (moral) and economic concerns indicative of the type of super-

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<sup>776</sup> Hudson, 2014, p.61.

<sup>777</sup> Tawney, 1990, p.276

<sup>778</sup> Weber, 2002, p.295

<sup>779</sup> Herbert Marcuse. 2002. *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society*. London: Routledge, p.82

<sup>780</sup> Dunn, 1999, p.142

banality I associate, echoing Baudrillard, with the meta-psychological effects of Equity fetishism, but which, as Tawney, Weber and Marcuse show, is an inescapable part of the construction of social expectations that correspond with the machinations of capital - a conjunction which also recalls the earlier discussion in this thesis of Marx with Freud.

We have seen that ECJ and in particular the idea of conscience are for stakeholders both objects of desire, in the form of remedies, vindication of rights and so on, and object *causes* of desire by virtue of being an added layer of banal bureaucracy that ensures the stakeholder maintains a certain motivating distance in the form of a future promise of finding the lost object *qua* private property and wealth. 'It is precisely the status of being out of reach', as Todd McGowan claims, 'that serves to animate the subject'<sup>781</sup>. Accordingly, ECJ never fulfils the promise of competence as such, nor has to, but, to paraphrase McGowan, 'the act of promising itself has a creative power' that ensures stakeholders remain engaged and continue to invest economically and psychically in property in accordance with the demands of capitalist ideology<sup>782</sup>. Yet Equity, ECJ, property rights nor wealth can or will ever reunite the stakeholder with the lost object, and the stakeholder as contemporary economic subject must perpetually negotiate the trauma of castration through a variety of substitutions in fantasy. And from the point of view of fetishism, in particular, a disavowal that a loss has ever occurred or that the subject is fundamentally constituted around a lack.

What is for stakeholders a competent civil justice system therefore, one capable of producing so-called good results in terms of economic reason (improved efficiency, favourable cost-benefit analyses of case-load disposal, and so on), is arguably

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<sup>781</sup> McGowan, 2016, p.215

<sup>782</sup> McGowan, 2016, p.225

incompetent by any measure that does not insist upon economic reason as the primary or only determining factor of civil justice. This is because, I argue, a competent civil justice system in the eyes of the stakeholder is one in which the messy, human reality at the core of civil justice has been deliberately masked in order to bring the stakeholder into a more immediate and ecstatic union with economics as objective reality. Moreover, one in which the reality of the failure of civil justice to realise the incomprehensibility of human relations through property and the accumulation of personal wealth, by instead promoting the property order as, for example, morally determinative, is masked by a thick tradition of neurotically defined language and principles that help structure stakeholder belief in the fantasies promulgated by capitalist ideology. As a result competence is not only a measure of the distance between the transcendental and banal into which the fetish is rooted or from which it emerges, but also a clear indication of the influence of capitalist ideology and its colonisation of, among other things, the intertwined discourses of consolidation and reform that have shaped civil justice, piecemeal, since Judicature.

### 3. The politics of Equity

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The only way the nineteenth century judges could choose, and the only way we can choose a background regime is by making a vast multiplicity of detailed distributive and other ethical choices about right and wrong in human interaction. The actual choice of the supposed "free market regime" of the late nineteenth century just could not be justified, then or now, on the basis of economic or legal science. The choice of that particular free market system over the other possibilities was inescapably political<sup>783</sup>.

In my theory and analysis of Equity fetishism I have presented a case that does not consider capitalism or neoliberal capitalism to be good facilitators of justice in the public interest nor on behalf of the commons. Prevailing forms of justice within capitalism befit a narrow cohort of stakeholders able to demonstrate the privilege necessary to gain

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<sup>783</sup> Kennedy, 1985, p.965



access to justice by virtue of substantial private interest and wealth, but that justice also defines and legitimatises forms of economic subjectivity in Western Common Law societies that is judged, almost exclusively, by the ability to own, to transact, and ultimately to perform and conduct oneself in a common sense *qua* neoliberal capitalist juridical-economic fashion. The deontological imperatives that defined Equity in Thomas More's time and even, albeit in a denuded way, through the ideas of Jeremy Bentham and up to Judicature are long gone in substance but preserved and fetishized in name and ideal as, among other things, the discretion of judicial reason and the flexibility of unconscionability that bends a utilitarian law to points of fairness demanded and defined by the economic will.

R.H. Tawney offers a useful summary of the course this thesis has followed, where, notwithstanding the early modern conjunction of law and religion in the life and work of Thomas More and thereafter, Tawney's references to departmentalization of religion within economics apply equally, I suggest, to the fate of Equity and the Common Law:

When the age of the Reformation begins, economics is still a branch of ethics, and ethics of theology; all human activities are treated as falling within a single scheme, whose character is determined by the spiritual destiny of mankind; the appeal of theorists is to natural law, not to utility; the legitimacy of economic transactions is tried by reference, less to the movements of the market, than to moral standards derived from the traditional teaching of the Christian Church; the Church itself is regarded as a society wielding theoretical, and sometimes practical, authority in social affairs. The secularization of political thought, which was to be the work of the next two centuries, had profound reactions on social

speculation, and by the Restoration the whole perspective, at least in England, has been revolutionized. *Religion has been converted from the keystone which holds together the social edifice into one department within it, and the idea of a rule of right is replaced by economic expediency as the arbiter of policy and the criterion of conduct* [emphasis added]<sup>784</sup>.

The notion of privilege is apposite here because it describes what both divides communities and creates the strange glue that binds them within capitalism, through aspiration and the bourgeois desire for private property and belief that it will lift them to a place of privilege. 'Private property has made us stupid and one-sided that an object is only *ours* when we have it – when it exists for us as capital', argues Marx, 'when it is directed possessed, eaten drunk, worn, inhabited, etc. – in short, when it is used by us. In the place of *all* physical and mental senses there has therefore come the sheer estrangement of *all* these senses, the sense of *having*. The human being had to be reduced to this absolute poverty in order that he might yield his inner wealth to the outer world'<sup>785</sup>. In contrast, Hayek claims that private property is not a privilege (and socialists, amongst others, are therefore wrong to refer to it as such), precisely because all are free to acquire it. Therefore even if only a few might actually do so, by virtue of a privileged relationship with civil justice, this does not make property, nor any means of attaining it, a form of privilege<sup>786</sup>. Yet the idea that all are free to acquire property is certainly contestable if not just simply wrong, especially given what prevailing scholarship on inequality maintains<sup>787</sup>. But, then again, this is exactly the type of fantasy alluded to throughout this thesis: a fantasy promulgated by capitalism that promises the

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<sup>784</sup> Tawney, 1990, p.273

<sup>785</sup> Marx, 1975, p.300

<sup>786</sup> Hayek, 2001, pp.83-84

<sup>787</sup> See note 6

stakeholder so much and delivers, at least in terms of a satiation of unconscious desires and often also in the material, proprietary substitutions they inhabit, so little.

To take political economy seriously, and perhaps more the necessity of its critique, in terms of Equity and civil justice is a message this thesis has attempted to communicate by bringing to the centre of the discussion the influence of capitalism on that field of juridical reason and practice. Capitalism, I have argued, promulgates fantasies, demands particular forms of subjectivity and conduct, and shapes the nature and institutions of civil justice in harmony with ‘the idolatry of wealth [...] the practical religion of capitalist societies’<sup>788</sup>. Equity is, therefore, political, although this is systematically and often obscured by shifts in socio-political dynamics that ultimately lead to the de-politicization of economic subjects *qua* ‘the Dictatorship of Capital’<sup>789</sup>. ‘The equity that most dominates the late capitalist imagination’, argues Fortier, ‘is equity as wealth’<sup>790</sup>. He continues:

“What is your equity?” is an economic and not a moral question. This notion of equity is well-grounded in legal precedent: common law recognizes only the rights of ownership; equity, out of fairness, recognizes property rights other than ownership. Thus we can purchase equitable property rights in things (companies, etc.) that we don’t actually own. Equity has always been in large part about property rights. But the elision of the principle of fairness at work, so that when we now speak of equity we don’t mean the principle of fairness that demands a recognition of

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<sup>788</sup> Tawney, 1990, p.280

<sup>789</sup> Han, 2017, p.6. For further left-critique on shifts in the political and the nature of de-politicization, see for example: Jacques Rancière. 1999. *Disagreement: Politics and Philosophy*. Translated by Julie Rose. Minneapolis: University of Minnesota Press; Slavoj Žižek. 1999. *The Ticklish Subject: The Absent Centre of Political Ontology*. London: Verso; Jodi Dean, 2009; Bruno Bosteels. 2011. *The Actuality of Communism*. London: Verso

<sup>790</sup> Fortier, 2005, p.186

certain property rights but only of the monetary value involved, seems something like the elision of the creation of value that Marx sees in the notion of capital itself. Such an elision of principle and right, even as it speaks of wealth, cheapens equity as a moral idea<sup>791</sup>.

Neither the super-banality of civil justice nor the ‘elision of the principle of fairness’ as a peculiar contribution that Equity makes to the field of civil justice can ultimately mask the political or the brutal and uncompromising core of competitiveness and self-interest that is the *sine qua non* of modern capitalist society, one which capitalism would rather the stakeholder did not see or concern themselves with for it might undermine the legitimacy of the capitalist project<sup>792</sup>. Instead, the fetishization of Equity structures a fantasy of fairness through civil justice and private property and presents it to the stakeholder as a coherent and complete moral project that masks reality and disavows the traumatic core of capitalist subjectivity.

In the mind of the fetishist, as Freud tells us in his 1927 formulation of the concept, ‘the woman *has* got a penis, in spite of everything; but this penis is no longer the same as it was before’<sup>793</sup>. For Freud (and Lacan), the first major change that occurs with regard to the penis in theoretical terms is its transformation into the phallus, what Jean-Joseph Goux describes in his own work conducted at the intersection between Marx and Freud as ‘the general equivalent of objects’<sup>794</sup>. For the fetishist, all objects are open to

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<sup>791</sup> Fortier, 2005, p.186

<sup>792</sup> ‘Capitalism portends the end of the sacred or sublime location that could continue to reside outside of the system of exchange’, argues McGowan, and accordingly everything ‘becomes secular and quotidian because everything can be exchanged for the right price. This is the universe we continue to inhabit today’ he concludes, ‘a universe in which value is reducible to exchange value and in which nothing transcends the gravitational pull of exchange – not honor, not loyalty, not even love’ (McGowan, 2016, p.218)

<sup>793</sup> Freud, 2001, p.154

<sup>794</sup> Goux, 1990, p.4

fetishization insofar as they are able to take the place of the penis (the object cause of desire) and as a consequence inherit 'the interest which was formerly directed to its predecessor [the penis]'<sup>795</sup>. The final twist in Freud's aetiology being that with the fetish the subject's interest 'suffers an extraordinary increase [...] because the horror of castration has set up a memorial to itself in the creation of this substitute'<sup>796</sup>. All attempts made by the subject to deflect the trauma of castration ultimately fail, leaving the subject only one conceivable option: learning to enjoy the limitations of human social existence and therefore 'what they do not have'<sup>797</sup>. Equity fetishism thus points to not competent civil justice, but its inverse and endlessly resisted form – especially by a neurotic legal community – *incompetent justice*.

'Facts never speak for themselves. Meaning is always imposed on them', says Roger Cotterrell, a reality that has rebounded throughout the topics discussed in this thesis. His solution (and mine) is the study of law in its broader social and political context and a call to theory that is both able and necessary 'to examine the coherence of the meanings we attach to what we observe about law and the context in which it exists'<sup>798</sup>. No shortage of critical work has achieved these aims. But Equity, I believe, has not enjoyed quite the same level of attention. This thesis has described Equity and civil justice as products of capitalist reason and logic and fetishism as a response within civil justice to capitalism. And within this complex psycho-judicial reading of civil justice we find Equity prevailing, not because legislation mandates it as such, but because it is necessary to the stakeholder's powerful desires and fantasy life within capitalism.

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<sup>795</sup> Freud, 2001, p.154

<sup>796</sup> Freud, 2001, p.154

<sup>797</sup> McGowan, 2013

<sup>798</sup> Cotterrell, 1987, p.80

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